Supreme Court, U.S.
FILED

No. 93- 93-1148 JAN 13 1994

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ALEXANDER LOCK,

Petitioner,

- against -

THE STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Patrick J. Mullaney, Esq.
Counsel of Record
7 Old Highway 22
Clinton, NJ 08809
(908) 735-4288

Harold J. Cassidy, Esq.
Cassidy, Foss & San Filippo
P.O. Box 896
225 Broad Street
Red Bank, NJ 07701
(908) 741-2525

176 pp

QUESTIONS PRESENTED

1. When does the life of a child begin?

2. Do children possess the natural and inalienable right to live or possess constitutional rights acquired through the Due Process and Equal Protection clauses of the Fourteenth Amendment of the Constitution of the United States at any time from conception to birth?

3. Whether it is violative of the natural and inalienable rights of a child or the child's natural father, or the rights of either of them acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States for New Jersey to fail to recognize Mr. Loce's standing to raise the rights of his child?

4. Where a child asserts his or her right to live, does the child's rights, when balanced against a mother's Fourteenth Amendment liberty interest, require the state to protect the child's interest in life at any time from conception to birth under any particular circumstance?

5. Is it an unconstitutional infringement of a child's natural and inalienable rights or the child's Fourteenth Amendment Due Process or Equal Protection rights or the rights of the child's father for New Jersey to convict Mr. Loce of trespass when his conduct was only that necessary to protect the life of his child?

6. Does a father have a Due Process and Equal Protection Right to defend the life of his child?

7. Whether this Court's decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992), *Roe v. Wade*, 410 U.S. 113 (1973), or other precedent prohibits

the Courts of New Jersey from applying New Jersey Constitutional protections, which extend rights to children prior to birth, to prohibit the criminal or quasi-criminal prosecution of Mr. Loce under the facts of this case?

8. Does New Jersey have an interest in protecting a mother's right to terminate the life of her child before birth sufficient to support a conviction of a father for attempting to defend and protect his child's life and interest in life?

9. Whether, in light of the undisputed facts of human development, and the recently acquired scientific evidence of the humanity of the child prior to birth, the actions of the State of New Jersey, through its legislative enactments, executive actions and the acts of its courts, which result in the painful dismemberment and death of children prior to birth (even after "viability"), are violative of the natural and inalienable rights of those children and their rights acquired through the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States?

PARTIES TO THE PROCEEDINGS

Petitioner is Alexander Loce, the father of a child whose life he sought to protect. Mr. Loce first instituted a civil suit in the Superior Court of New Jersey on September 7, 1990, seeking to enjoin the abortion of his child. When he exhausted his civil suit that night (New Jersey Supreme Court Justice Robert Clifford denied single justice relief), Mr. Loce attempted to protect the child's life the next day, September 8, 1990, by blocking access to the operating room at the clinic where the child's mother sought to terminate the child's life.

Respondent is the State of New Jersey which refused to provide Mr. Loce and his child access to court by dismissing his civil complaint and then removed him from the premises of the clinic so the child's life could be terminated, and arrested, prosecuted and convicted him of trespass for acting in the child's best interest and attempting to defend the child's life.

There are no other parties on this petition. There were fourteen co-defendants in the state court proceedings, and four of them, Tina Krail, Lori Chadwick, Deborah Smoldore, and Jeannie Henderson, have filed a separate Petition with this Court on behalf of the four of them only. That Petition is cited herein as "Krail Pet." The other ten co-defendants have not filed a Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED . . . . . (i)

PARTIES TO THE PROCEEDINGS . . . . . (iii)

TABLE OF AUTHORITIES . . . . . (viii)

ORDERS AND OPINIONS DELIVERED IN THE CASE 1

STATEMENT OF JURISDICTION 2

STATEMENT OF CONSTITUTIONAL PROVISIONS 2

STATEMENT OF THE CASE 2

A. STATEMENT OF FACTS 3

B. PROCEDURAL HISTORY 3

REASONS WHY CERTIORARI SHOULD BE GRANTED 6

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA WHICH DEMONSTRATE THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION; AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A CHILD HAS RIGHTS PRIOR TO BIRTH. 9

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES. 9

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth. 9

2. The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, show that that Precedent Erroneously Applied Constitutional Principles. . . . 11

B. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES PROVIDE NEW FACTUAL INFORMATION WHICH DEMONSTRATES THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE CHILD EXPERIENCES PAIN DURING ABORTIONS IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. 13

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology. 14

2. The Life of Each Person Begins at Conception. 16

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception. 16

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception. 19

3. The Child Can Experience Pain as Early as Eight Weeks After Conception. 21

II. THE WRIT SHOULD BE GRANTED TO DETERMINE ISSUES NEVER DECIDED BY THIS COURT: [1] DO ALL HUMAN BEINGS ENJOY A RIGHT TO LIVE PRIOR TO BIRTH; AND [2] IS A CHILD'S INTEREST IN LIFE, PRIOR TO BIRTH, CONSISTENT WITH THOSE OF THE CHILD'S MOTHER. 30

A. THE WEIGHT OF THE LEGAL AUTHORITIES CONCLUDE THAT THE LIFE OF A CHILD BEGINS AT CONCEPTION. 30

B. THE RIGHT OF A PERSON TO LIVE DEPENDS ONLY UPON THE EXISTENCE OF THE INDIVIDUAL HUMAN BEING. 32

C. DENYING CHILDREN THE RIGHT TO LIVE ON THEIR STATUS AS "UNBORN" IS A DENIAL OF THE EQUAL PROTECTION OF THE LAW. 39

III. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE. 40

A. NATURE AND SCOPE OF THE MOTHER'S REAL INTERESTS. 40

B. IDENTIFYING THE REAL NATURE OF THE LIFE IN QUESTION. 44

C. ONCE A WOMAN CONCEIVES AND HER CHILD EXISTS HER PERSONAL INTERESTS ARE CONSISTENT WITH THE INTERESTS OF HER CHILD. 45

V. MR. LOCE HAS THE STANDING TO RAISE THE RIGHTS OF HIS CHILD. CONVICTION OF HIM UNDER THE FACTS OF THIS CASE IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF BOTH THE CHILD AND MR. LOCE. 60

CONCLUSION 65

TABLE OF AUTHORITIES

CASE CITATIONS:

Amadio v. Levin,
501 A.2d 1085 (Pa. 1985) 31

Baker v. Carr,
369 U.S. 186 (1962) 40, 60, 64

Barrows v. Jackson,
346 U.S. 249 (1953) 60, 61

Board of Regents v. Roth,
408 U.S. 564 (1972) 42

Buchanan v. Warley,
245 U.S. 60 (1917) 61

Buckley v. Valeo,
424 U.S. 1 (1976) 10

Burnet v. Coronado Oil and Gas Co.,
285 U.S. 393 (1932) 11, 12

Califano v. Goldfarb,
430 U.S. 199 (1977) 62

Califano v. Webster,
430 U.S. 313 (1977) 62

Carey v. Population Services Intl.,
431 U.S. 678 (1977) 61

Cheaney v. State,
285, N.E.2d 265 (1972) (Ind.) 31

Codd v. Velger,
429 U.S. 624 (1977) 42

Cowe v. Forum Group, Inc.,
541 N.E.2d 962 (Ind.App. 1989) 31

Craig v. Boren,
429 U.S. 190 (1976) 61, 62

D.Y.F.S. v. A.W.,
512 A.2d 438 (1986) (N.J.) 46

Day v. Nationwide Mut. Ins. Co.,
328 So.2d 560 (1976) (Fla.) 31

Doe v. Bolton,
410 U.S. 179 (1973) 62, 63

Dred Scott v. Sanford,
60 U.S. 393 (1857) 38

Dunn v. Blumstein,
405 U.S. 330 (1972) 40

Eisenstadt v. Baird,
405 U.S. 438 (1972) 61

Evans v. Olson,
550 P.2d 924 (1976) (Okla.) 31

Gleitman v. Cosgrove
227 A.2d 689 (1967) (N.J.) 30, 59

Greater Southeast Community Hosp. v. Williams,
484 A.2d 394 (D.C. Ct. App. 1984) 31

Griswold v. Conencticut,
381 U.S. 479 (1965) 40, 41, 60, 61, 64

Grosjean v. American Press Co.,
297 U.S. 233 (1936) 10, 11

Group Health Ass'n v. Blumenthal,
453 A.2d 1198 (1983) (Md.) 31

Hopkins v. McBane,
359 N.W.2d 862 (N.D.) 31

Hummel v. Reiss,
608 A.2d 1341 (1992) (N.J.) 30

Ingrahm v. Wright,
430 U.S. 651 (1977) 42

In the Matter of Baby M,
537 A.2d 1227 (1988) (N.J.) 46, 49, 57

Kalafut v. Gruver,
239 S.E.2d 681 (1990) (Va.) 31

Kelly v. Gregory,
125 N.Y.S. 2d 696 (1953) 31

Kraemer v. Union Free School District,
395 U.S. 621 (1969) 40

Lehr v. Robertson,
463 U.S. 248 (1983) 46, 47

Meachum v. Fano,
427 U.S. 215 (1976) 42

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 47

Montanye v. Haynes,
427 U.S. 236 (1976) 42

Morrisey v. Brewer,
408 U.S. 471 (1972) 42

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 39

New Jersey v. Loce,
630 A.2d 792 (App.Div. 1993) (N.J.) . . . . . passim

New Jersey v. Loce,
630 A.2d 843 (L.Div. 1991) (N.J.) 1, 5

Northwestern Life Insurance Co. v. Riggs,
203 U.S. 355 (1907) 11

O'Callahan v. Parker,
395 U.S. 250 (1969) 12

Payne v. Tennessee,
111 S.Ct. 2597 (1991) 12

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 11, 60-62

Planned Parenthood of S.E. Pa. v. Casey,
505 U.S. , 112 S.Ct. (1992) . . . . . passim

Planned Parenthood v. Danforth,
428 U.S. 52 (1976) 61

Puhl v. Milwaukee Auto Ins. Co,
99 N.W.2d 163 (1959) (Wis.) 31

Quillion v. Walcott,
434 U.S. 246 (1978) 46, 47

Regan v. Taxation with Representation,
461 U.S. 540 (1983) 10

Renslow v. Mennonite Hospital,
397 N.E. 2d 1250 (1977) (Ill.) 31

Reynolds v. Sims,
377 U.S. 533 (1964) 40, 64

Roe v. Wade,
410 U.S. 113 (1973) . . . . . passim

Rowan v. U.S. Post Office Department,
397 U.S. 728 (1970) 59

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 42

Runyon v. McCary,
427 U.S. 160 (1976) 59

Santosky v. Kraemer,
455 U.S. 745 (1982) 46, 62

Shapiro v. Thompson,
394 U.S. 618 (1969) 40, 64

Shelley v. Kraemer,
334 U.S. 117 (1948) 39

Simon v. Mullin,
380 A.2d 1353 (1977) (Conn.) 31

Singleton v. Wolff,
428 U.S. 106 (1976) 61, 63

Skinner v. Oklahoma,
316 U.S. 535 (1942) 40, 62

Smith v. Brennan,
157 A.2d 497 (1960) (N.J.) 30, 31

Smith v. Organization of Foster Families,
431 U.S. 816 (1977) 42, 47

Smith v. State,
33 Me. 48 (1851) 31

Solorio v. U.S.,
483 U.S. 435 (1987) 12

Stanley v. Illinois,
405 U.S. 645 (1972) 46, 47, 62

Steggall v. Morris,
358 S.W. 2d 577 (1953) (Mo.) 31

Steinberg v. Brown,
321 F.Supp. 741 (N.D. Ohio 1970) 31

Sullivan v. Little Hunting Park,
396 U.S. 229 (1969) 61

Sylvia v. Gobeille,
220 A.2d 222 (1966) (R.I.) 31

Thornburgh v. A.C.O.G.,
476 U.S. 747 . . . . . 7, 8, 43

Torigan v. Watertown News Co., Inc.,
225 N.E.2d 926 (1967) (Mass.) 31

Truax v. Raich,
239 U.S. 33 (1915) 60

United States v. Scott,
437 U.S. 82 (1978) 12

Valence v. La. Power & Light Co.,
50 So.2d 847 (La. App. 1951) 31

Washington v. Davis,
426 U.S. 229 (1976) 10

Webster v. Reproductive Health Services,
492 U.S. 490 (1989) 8, 12, 44

Western Turf Association v. Greenberg,
204 U.S. 359 (1907) 11

Williams v. Marion Rapid Transit,
87 N.E.2d 340 (1949) (Ohio) 31

Wolfe v. Isbell,
280 So.2d 758 (1973) (Ala.) 31

Womack v. Buchhorn,
187 N.W.2d 218 (1971) (Mich.) 31

Yick Wo v. Hopkins,
118 U.S. 356 (1885) 39

Zacchini v. Scripps - Howard Broadcasting Co.,
433 U.S. 562 (1977) 59

CONSTITUTIONAL PROVISIONS:

Fourteenth Amendment §1, Constitution of the
United States ..... passim

Art. I, §1, N.J. Const. 1947 ..... passim

STATUTES:

N.J.S.A. 2C:18-3 ..... 1, 3-4

N.J.S.A. 2C:3-5 ..... 4, 64

N.J.S.A. 2C:32-2 ..... 4, 64

N.J.S.A. 2C:3-10 4

N.J.S.A. 2C:3-8 4

OTHER LEGAL AUTHORITIES:

Amar, the Bill of Rights, 101 Yale L.J. 1193 (1992) 38

Arkes, H. *Beyond the Constitution*, Prin. Univ. Press, (1990). 32

Cong. Globe 39th Cong. 1st Sess. Dec. 19, 1865 Jan. 19, 1866 35

Cong. Globe, 35th Cong., 1st Sess.App. 65-66 (1858) ... 36

Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 35

Cong. Globe, 37th Cong. 2d Sess. 1638 (1862) 37

Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) 35

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) 36

Cong. Globe, 39th Cong., 1st Sess. 74(1865) 32

Cong. Globe, 40th Cong., 1st Sess.542 (1867) 33

Cong. Globe, 42nd Cong., 1st Sess.App. 229 (1871) 37

Constitution of the United States of America: Analysis and Interpretation, Lester S. Jayson, et al. ed. (1973) 12

Constitution of the United States of America: Analysis and Interpretation, Killian, J. et al., ed. (1987), at p. 1623. ... 32

Crosskey, Politics and the Constitution II, (1953) 38

Curtis, No State Shall Abridge: The 14th Amendment and the Bill of Rights, (1986) 38

Douglas, William O., "Stare Decisis," 49 Colum. L.Kev. 735(1949) 12

McMaster & Stone's History of Pennsylvania in the Convention, p. 758. 33

Nelson, The 14th Amendment, Harvard Press (1988) 38

Report on Human Life Bill, Subcommittee and Separation of Powers Committee on the Judiciary, S. 158, 97th Cong., 1st Sess. (1981) 19-21

ten Broek, J., *The Anti-Slavery Origins of the Fourteenth Amendment*, (1951) 38

The Papers of Alexander Hamilton, Vol. I:1768-1778 Ed. Harold C. Syrett, Columbia Univ. Press, N.Y. (1961) "The Farmer Refuted". 33

The Works of James Wilson, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II p. 314-335. .. 34

Wilson, A.E., "Stare Decisis" Quo Vodis?, 33 Geo. L.J. 251(1945) 12

SCIENTIFIC AND MEDICAL AUTHORITIES:

Adami H-O, et als. (1990) "Absence of Association Between Reproductive Variables and the Risk of Breast Cancer in Young Women in Sweden and Norway," *Brit J Cancer,* 62:122-126 52

Adler, N., et als. (1992) "Psychological Factors in Abortion," *American Psychologist,* 47, 10, 1194-1204 . . . . . 52, 53

Akron Pregnancy Service (1993), *Post-Abortion Research Project,* Akron, OH; 105 E. Market Street 52, 53

Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. . . . . 25, 27

Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar, 1985, p. 109. 25

Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of counseling & Development,* 69, 377-379 . . 52, 53

Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174 15

Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. 15

Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology,* 87, 1115-1622; Akron Pregnancy Service, supra 54

Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239 29

Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186. 22

Barnard, C., *The Long Term Psychosocial Effects of Abortion,* Portsmouh, N.H., Institute for Abortion Recovery & Research, 1990 53

Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584 16

Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). 55

Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)) 15, 19

Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects, *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. 25

Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969). 47

Bradley, C. (1984) "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry,* 29, 494 . . . . . 52, 53

Brinton L.A., et als. (1983) "Reproductive Factors in the etiology of Breast Cancer" 47:757-762 51

Campbell, et als. (1988) "Abortion in Adolescence," in *Adolescense,* 23, 92, 813-823 52

Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985 15

Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13. 25

Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83 . . . . . 17, 18

Choi N.W., et als. (1978) "An Epidemiological Study of Breast Cancer" *Am J Epidemiology,* 107:510-521 51

Clark, R.M., et als. (1989) "Breast Cancer and Pregnancy: The Ultimate Challenge" *Clin Oncol Royal Coll Radiol*, 1:11-18 . 51

Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985. . . . . 16, 22

Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109 15

Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Jouranl of Psychiatry,* 148, 5, 578-588, 53

David, et al., "Postpartum and Postabortion Psychotic Reactions," in *Family Planning Perspectives,* (1981) 88-91 52

de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. 29

Dvoirin, V.V., et als. (1978) "The Role of Reproductive History in Breast Cancer Causation" in *Methods and Results of Studies of Breast Cancer Epidemiology*, Tallinn, 53-56 (in Russian, reported by Remennick, 1990 [ref #24]) 51

Ewertz M., et als. (1988) "Risk of Breast Cancer in Relation to Reproduction Factors in Denmark" *Br J Cancer,* 58:99-104 51

Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122. 27

Fischbach, G.D. "An Intro. to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, ed. M.D. Erich, et al. New York: Raven Press, 1987. 22

Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441 . 23

Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1348 24

Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251 28-30

Freeman, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions" in *Obstetrics & Gynecology,* 55, 5, 625-635. 53

Freemard, et als. (1980) "Emotiona! Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology,* 55, 5, 625-635 54

Garfinkel, B., et als. (1986) "Stress, Depression and Suicide: a Study of Adolescents in Minnesota," in *Responding to High Risk Young,* Minnesota Extension Service: University of Minnesota 52

Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63 16

Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975 p. 183 16

Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*. 28

Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349 . . . . . 15, 19

Hanley, et als. (1992) *Woman Outpatients Reporting Continuing Post-Abortion Distress: A Preliminary Inquiry,* Paper Presented at the Eighth Annual Meeting of the International Society for Traumatic Stress Studies, Los Angeles 54

Harlock E.B. Child Development 6th ed. McGraw-Hill, Inc. 1978 16

Harris J.R., et als. (1992) "Breast Cancer" (first of three parts), *N Engl J Med,* 327:319-328 52

Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49 24

Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. 24

Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. 24

Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53. 19

Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535 15

Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362. 18

Howe, H.L., et als. (1989) "Early Abortion and Breast Cancer Risk Amoung Women Under Age 40" *Int J Epidemiol*, 18:300-304.51

Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Jour. of Hum. Gen., 39:11-24 (1986). 18

Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications,(1991). 18

Jeffreys, A.J., et als., "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819. 18

Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35. 28

Kelsey, J.L., et als. (1981) "Exogenous Estrogens and Other Factors in the Epidemiology of Breast Cancer" *J Nat Cancer Inst*, 67:327-333 51

Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2 (1982). 47

Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475. 18

Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885. . . . . 25, 28

Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36 15

Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30 24

Lin, T.M., et als. (1971) "Epidemiology Characteristics of Cancer of the Breast in Taiwan" *Cancer,* 27:1497-1504 51

Lindefors-Harris B-M, et als. (1989) "Risk of Cancer of the breast After Legal Abortion During the First Trimester: A Swedish Register Study" *Br Med J,* 299: 1430-1432 51

Lindefors-Harris B-M, et als. (1991) "Response Bias in a Case-control Study: Analysis Utilizing Comparative Data Concerning Leagal Abortions From Two Independent Swedish Studies" *Am J Spidemiol,* 134:1003-1008 52

Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. 24

Lowe C.R., et als. (1970) "Breast Cancer and Reproductive History of Women in South Wales" *Lancet*, i:153-156 51

Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). 47

Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989. 27

Major, B. et als. (1985) "Attributions, Expectations and Coping with Abortion," in *Journal of Personality & Social Psycology,* 48, 3, 585-599 52

Malhortora, N., L. Han, *Privyilage of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991) 24

Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Developmer.t and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375. 26

Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodes" In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130 15

Miller, *New Physiology of Women* (1986) 55

Miller, *What do We Mean by Relationships*, 22 Work in Progress, Stone Center, Wellesly College 1, 16 (1986) 55

Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985. 19

Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26 16

Nishiyama, F. (1982) "The Epidemiology of Breast Cancer in Tokushima Prefecture" *Shikoku Ichi* (*Shikoku Med J*), 38:333-343 (Tr. Frank C., Farnham Co., Philadelphia). 51-52

Olsson H., et al (1991) "Proliferation and DNA Ploidy in Malignant Breast Tumors in Relation to Early Oral Contraceptive Use and Early Abortions" *Cancer*, 67:1285-1290 50

Olsson H., et al. (1991) "Her - 2/neu and INT2 Proto-oncogene Amplification in Malignant Breast Tumors in Relation to Reproductive Factors and Exposure to Exogenous Hormones" *J Nat Cancer Inst*, 83:1483-1487 51

Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60 16

Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast Canser Res Treat*, 3:339-344 50

Paffenbarger R.S., et als. (1980) "Characteristics that Predict the Risk of Breast Cancer Before and After the Memopause" *Am J Epidemiology*, 112:258-268 51

Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51. 19

Parazzini F., et als. (1991), "Spontaneous and Induced Abortions and Risk of Breast Cancer," Br J Cancer, 53:281-284 52

Pare and Raven, "Follow-up of Patients Referred for Termination of Pregnancy," *The Lancet* (1970) Vol. I pg. 35-638 53

Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145. 27

Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12 54

Pike, M.C., et als. (1981) "Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women" *Br J Cancer,* 43:72-76 51

Plant, M. (1985) *Women, Drinking and Pregnancy,* London; Tavistock Publications; Reardon, D. (1987) *Aborted Women: Silent No more, supra.* 53

Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989 24

Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731. 19

Ravnihar B., et als. (1971) :"Epidemiologic Features of Breast Cancer in Slovenia" 1965-1967, *Eur J Cancer,* 7:295-306 . 51

Reardon, "Criteria for the Indentifiable High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 aborted Women," presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver 52-54

Remennick, L. (1990) "Induced Abortion as a Cancer Risk Factor: A Review of Epidemiological Evidence" *J Epidemiol Community Health,* 44:259-264 51

Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.* . . . 27

Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176 . . . . . 23, 24

Rosenberg, L., et als. (1988) "Breast Cancer in Relation to the Occurrence and Time of Induced and Spontaneous Abortion" *Am J Epidemiol,* 127:981-989 51

Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcinogenesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol,* 100:497-451 51

Russo, N. & Zierh, K. (1992) "Abortion, Childbearing and Women's Well-Being," in *Professional Psychology: Research & Practice,* 23, 4, 269-280 . . . . . 52, 53

Salber, E.J., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Boston" 1965-66, *J Nat Cancer Inst,* 43:1013-1024 51

Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431 23

Segi M., et als. (1957) "An epidemiological Study on Cancer in Japan" *GANN* 48 Suppl: 1-43f; Wynder E.L., et als. (1960) "A Study of the Epidemiology of Cancer of the Breast" *Cancer,* 13:559-601 51

Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. 29

Soini I. (1977) "Risk Factors of Breast Cancer in Finland" *Int J Epidemiology,* 6:365-373 51

Speckland, H. (1987); *Psycho-Social Stress Following Abortion,* Kansas City, MO: Sheed & Ward 52, 53, 54

Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413 24

Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. 29

Sugarman, "Parental Influences in Material Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). 47

Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136 . . . . . 17, 18

Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719 . . . . . 17, 18

Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. 27

Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92. 19

The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674. 28

Toti A., et als. (1980) "Possible Indication of Breast Cancer Risk Through Discriminant Functions" *Cancer,* 46:1280-1285 . . 51

Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399. 27

Valaoras V.G., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Greater Athens" 1965-67 *Int J Cancer,* 4:350-363 51

Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. 29

Vaughan, H. (1991) "Canonical Variates of Post Abortion Syndrome," Portsmouth, NH, Institute for Abortion Recovery and Research 53

Vessey, M.P., et als. (1982) "Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk" *Br J Cancer,* 45:327-331 51

Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20. 16

Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20. 16

Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. 27

Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983 15

Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy.* Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19. 25

Wallerstein, et als. (1972) "Psychosocial Singular of Therapeutic Abortion in Young Unmarried Women" in *Archieves of General Psychiatry Vol. 27* 53

White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185 . . . 15

Wilmoth, G., de Alteriis, & Bussell, D. (1992) "Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence," *Journal of Social Issues,* 48, 3, 37-66 52

Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Neucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience, 1990, 34 to p.491-8 26

Yuan, J-M, et als. (1988) "Risk Factors for Breast Cancer in Chinese Women in Shanghai" *Cancer Res,* 48:1949-1953 . 51

Yuasa S., et als. (1970) "Lactation and Reproductive Histories of Breast Cancer Patients in Tokyo, Japan" *Bull World Hlth Org,* 42:195-204. 51

Zolese, G. & Blacker, C. (1992) "The Psychological Complications of Therapeutic Abortion," *British Journal of Psychiatry,* 160, 742-749 . . . . . 52, 53

OTHER AUTHORITIES AND LITERARY CITATIONS:

Adrienne Rich, *Of Women Born*, 1976 56

Anthony, S. "Marriage and Maternity," *The Revolution,* 4 (1)4, 869] 55

Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottowa: Supply and Services*, 313-321 54

Bancroft, Hist. of U.S., Vol. VI p. 387. 33

Blaustein, A.R., and Field, A.H. Overruling Opinions in the Supreme Court, 57 Mich. L.Rev. 151, 184-194(1958) 12

Chesler, Phyllis, (1988) *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed. 49-50

deBeauvoir, Simone, *The Second Sex*, 1952. 55

Franache, *The Ambivalence of Abortion*, New York, Random House, 1978 54

Germaine Greer, *The New Republic*, interview, October 5, 1992. 57

Gilligan, *In a Different Voice*, at 23 (1982) 55

Louis Harris & Assoc. (April 20, 1993), "The Health of American Women," commissioned by the *Commonwealth Fund* 52

MacMaster & Stone, History of Pennsylvania in the Convention 33

Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife*, (1993) Vol. XIII, 1, p.1, 5 56

Open Arms, (1993) *Abortion Information Survey Project*, Columbia, MO: P.O. Box 1056 . . . . . 52, 53

Plant, M. (1985) *Women, Drinking and Pregnancy*, London; Tavistock Publications 53

Reardon, D. (1987), *Aborted Women: Silent No More*, Westchester, ILL: Crossway 52-54

Stockharm, A., *Takology* (1887) 57

In The

Supreme Court Of The United States

OCTOBER TERM, 1993

No. 93-

Alexander Loce,

Petitioner

v.

The State of New Jersey

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner Loce respectfully prays that a Writ of *Certiorari* issue to review the June 30, 1993 judgment of the Appellate Division of the Superior Court of New Jersey and that of the New Jersey Supreme Court entered on October 21, 1993.

ORDERS AND OPINIONS DELIVERED IN THE CASE

The April 29, 1991 order of the municipal court of Morristown, New Jersey convicting petitioner under N.J.S.A. 2C:18-3 (trespass) is at A-201. The opinion of the Superior Court of New Jersey, Law Division, entered October 8, 1991, affirming the conviction is at A-89-106 [630 A.2d 843 (1991)]. The opinion of the Appellate Division, dated June 30, 1993, affirming the conviction solely on federal grounds, citing *Roe v. Wade*, 410 U.S.

113 (1973) and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _, 112 S.Ct. 2791 (1992) is at A-82-88; [630 A.2d 792 (1993)]. The Order of the New Jersey Supreme Court entered October 21, 1993 denying Certification is at A-204.

STATEMENT OF JURISDICTION

Petitioner seeks a Writ of Certiorari to review a Final Order of the Supreme Court of New Jersey entered October 21, 1993 and the opinion and order of the Appellate Division of the Superior Court of New Jersey, dated June 30, 1993. The Petitioner has claimed rights under the constitution of the United States, all the issues presented were raised below and the jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(a).

STATEMENT OF CONSTITUTIONAL PROVISIONS

This Petition involves the following constitutional provisions:

1. The Fourteenth Amendment Due Process Clause which states: "Nor shall any state deprive any person of life, liberty or property without due process of law." U.S.Const., amend. XIV, §1;

2. The Fourteenth Amendment Equal Protection Clause which states: "Nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, §1.

STATEMENT OF THE CASE

The petitioner was prosecuted and convicted for attempting to save the life of his child, while those who terminated the child's life enjoyed governmental protection. This is an abortion case.

A. STATEMENT OF FACTS

Alexander Loce was engaged to be married when his fiancee, Ms. Z, learned she was pregnant with their child. When Ms. Z told petitioner she planned to terminate their child's life he tried to persuade her against an abortion [A-90]. On September 7, 1990, Mr. Loce sought to restrain the abortion. That day the Superior Court dismissed his complaint, the Appellate Division affirmed the dismissal and the New Jersey Supreme Court denied single justice relief [A-90; 202-203].

With the intent to prevent the death of his child, Mr. Loce went to the abortion clinic the next day, with fourteen others, entered the building, sat on the floor and locked himself to the others with handcuffs and bicycle locks blocking the entrance to the operating rooms [A-91]. He was removed from the premises, arrested and charged with trespass under N.J.S.A. 2C:18-3(b). The child's life was terminated later that day at the same clinic.

B. PROCEDURAL HISTORY

Petitioner was tried in Morristown April 13, 1991 before Hon-

orable Michael J. Noonan. Mr. Loce stipulated to all of the elements of the offense under 2C:18-3(b) except the requisite criminal intent, and subject to the affirmative defenses under N.J.S.A. 2C:3-5 (forceful protection of other persons), N.J.S.A. 2C:32-2 (use of force for necessity and other justifications), N.J.S.A. 2C:3-10 (justification in property crimes), N.J.S.A. 2C:3-8 (force by persons with special responsibilities) and New Jersey State Constitution Article I, Section I (right to defend life), and that his conviction would constitute an unconstitutional deprivation of his and his child's natural and inalienable rights to life and defend life and the rights of both of them arising under the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution [A-92-93; A-86-87; A-188-189]. New Jersey stipulated at trial that Ms. Z was the fiance of Mr. Loce and eight weeks pregnant with their child. Mr. Loce introduced eloquent evidence establishing the fact that human life begins at conception, that the child is a complete, separate, unique human being immediately following conception, the child can experience pain as early as eight weeks after conception [A-109-169], and his only purpose was to defend his child's life [A-86, A-91].

On April 29, 1991 Judge Noonan found that the life of a person

begins at conception, that the eight week old "fetus" was a person, a human being, and was a "separate and distinct human being from the mother, was a living person, ... unique and individual" [A-198]. Nonetheless, he convicted Mr. Loce under N.J.S.A. 2C:18-3(b) because he felt bound by *Roe v. Wade*, supra, which, he stated "legalized the execution of a human being" [A-200]. Petitioner appealed to the Superior Court, Law Division which affirmed the conviction by the same reasoning [A-108] [630 A.2d 843]. Petitioner appealed to the Appellate Division, arguing that his conviction is a violation of the federal and state constitutional rights of Mr. Loce and his child. On June 30, 1993 the Appellate Division affirmed the conviction [630 A.2d 792] and the Supreme Court of New Jersey denied a petition for certification by order entered October 21, 1993 [A-204].

The Appellate Division clearly affirmed solely on federal law:

> Although stated in a variety of ways, defendant Loce contends that (1) human life begins at conception and the unborn child enjoys the constitutional protection of due process under the Fourteenth Amendment to the United States Constitution and Article I of the New Jersey Constitution, (2) the genetic father has standing to raise the constitutional rights of the fetus and has an independent constitutional right to protect the unborn child, (3) their rights are paramount to the privacy interest of the mother, and (4) the criminal prosecution constituted an improper intrusion upon the fundamental rights of Loce and the unborn child. ... The right to an abortion ... established by the

> United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, ... has only recently been reaffirmed in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. _ 112 S.Ct. 2791 (1992). The purported rights asserted by defendants independently and on behalf of the fetus are unsupported by case law, whereas the mother's rights, which they claim are outweighed, are firmly established. [A-86-88]

This Court has never decided when the life of a child begins, and whether a child has rights prior to birth (in light of the child's existence). The child's personal interest in life has never been examined and weighed and the true nature of a mother's interests have never been identified in the context of the child's actual existence. Certiorari should be granted to decide these issues.

REASONS WHY CERTIORARI SHOULD BE GRANTED

In this case one parent acted in the best interest of his child while New Jersey assisted, and protected the other parent's termination of their child's life. The New Jersey Courts ruled they were precluded by *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S._, 112 S.Ct. 2791 (1992) from recognizing that the child was a human being possessing rights before birth. The resulting injustice is the product of *Roe's* failure to decide when the life of a human being begins, and whether, recognizing that a child is a human being prior to birth, these children have constitutional rights. In *Casey*, both the

Joint Opinion and the Dissent stated it was necessary *Roe* be reexamined.[1] However, by not reexamining whether the child possesses constitutional rights prior to birth, *Casey* failed to reexamine *Roe* in its most essential element.[2] Until now this court has only balanced a very limited set of perceived interests of a woman against a poorly defined interest of the states, without consideration of the child's personal interest in actual life. As a result, the interests of a mother and the "interests of the State" have not been satisfactorily identified and their relative weight when balanced have never accurately reflected the real interests of either.[3] The problem stems from the Court's conclusion that it

[1] Casey, 112 S.Ct. at 2804; Rehnquist, C.J., dissenting 112 S.Ct. at 2855.

[2] See, similar observation of Justice Scalia, dissenting, 112 S.Ct. at 2875. Justice Stevens alone addresses the question in Casey. But his statement that the Joint opinion implies that the child is not a "constitutional person" is no more true than the observation that the Joint Opinion implies that a child, after viability, is unequivocally a person in fact. The latter contradicts the former. *Casey* addressed neither. See, *Casey*, 112 S.Ct. at 2807.

[3] This is substantially acknowledged in *Casey*, 112 S.Ct. at 2818. The mother's right was defined in *Roe* as "fundamental" throughout pregnancy. The state's interest in protecting the life of the child was not recognized before "viability" and thereafter the state's interest (described as one to protect "potential life") became "compelling." *Roe*, 410 U.S. at 163, 164. In *Casey*, a mother's rights are neither referred to as "fundamental" nor the state's interest as "compelling" but the result is the same: a mother and her physician may terminate the life of her child before "viability" but the state can prohibit it thereafter. In both analyses it is never precisely defined what is occurring: does the interest of the mother diminish [or is it now waived]? See, *Casey*, 112 S.Ct. at 2817] or does the state's interest become greater (as stated in *Roe*?) The waxing and waning of either set of interests has often been the subject of criticism. See, *Thornburgh*

could not, in 1973, reach reliable judgment about the fact of the child's existence (and therefore ignored the child's interest in actual life). By failing to address the fact of the child's life, the court has rendered a *de facto* judgment which imposes upon all of society the view that the lives of this class of children have no value — precisely the judgment about the lives of people that governments, especially courts, have no power to make. [See, IIB]. Equally important is the fact that the child's existence materially alters the true nature of the interests of a woman. Her interests as a pregnant mother must be taken into account, and they conflict with any "interests" before pregnancy which are inconsistent with those of her child. Ignoring this reality has resulted in harm to the mothers subjected to abortion as a "remedy" to satisfy unprotectible "interests" in conflict with her real ones. [See, Pt. III].

v. A.C.O.G., 476 U.S. 747, 814, 828 (O'Connor, J., dissenting) "I do, however, remain of the views expressed in my dissent in *Akron*, 462 U.S. at 459-466. The state has compelling interests in ensuring the general health and protecting potential human life, and these interests exist 'throughout pregnancy')" Id. at 461. *Thornburgh v. A.C.O.G.*, 476 U.S. at 785 (White, J., dissenting) "the state's interest, if compelling after viability, is equally compelling before viability.") *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) ("We do not see why the state's interest in protecting potential human life should come into existence only at the point of viability and ... therefore be a rigid law allowing state regulation after viability but prohibiting before viability.")

I. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA WHICH DEMONSTRATE THAT: (1) THE LIFE OF A PERSON BEGINS AT CONCEPTION; AND (2) THE CHILD EXPERIENCES PAIN PRIOR TO BIRTH. THESE FACTS REQUIRE A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER A CHILD HAS RIGHTS PRIOR TO BIRTH.

A. THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

1. The Inability of the *Roe* Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.

The whole basis for the *Roe* decision was the premise that in 1973 it was not possible to determine when life began:

> (1) We need not resolve the difficult question of when life begins. ...the judiciary, *at this point in the development of man's knowledge*, is not in a position to speculate as to the answer" 410 U.S. at 159 (emphasis added); and [therefore] (2)...The word 'person', as used in the Fourteenth Amendment, does not include the unborn. 410 U.S. at 158.

Roe is the only case in which the United States Supreme Court reviewed that issue.[4] Significant recent developments and discoveries in science and medicine require a re-examination of Sections IX(A) and IX(B) of *Roe*, 410 U.S. at 156-162, which reserved that question for a later Court when "man's knowledge"

THE FOLLOWING PAGES WERE POOR HARD COPY

[4] *Casey* reexamined *Roe* but did not review Sections IX(A) and IX(B) of *Roe*.

is sufficient.[5] Because *Roe* did not determine when the life of a child began, its legal analysis was quite irrelevant to the one the Court must provide once it is found that the child is a human being prior to birth.[6] Thus, *Roe*: [1] ignored what would otherwise have been applicable principles of constitutional interpretation as they apply to the rights of the child [see, IIA2]; and [2] misidentified a mother's true interests to the detriment of the woman of this nation [see, Point III]. *Roe* also ignored prior precedent of the Court which found a corporation was a "person" with liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* is relevant in three separate ways: [1] a corporation no more meets the *Roe* test for a "person" than does

[5] If *Roe* had benefit of current knowledge it would have found life begins at conception. See IB below; A-109 to A-169; Appendix B at A-19 to A-30.

[6] *Roe* found that it was "persuaded" that "person" "as used in the Fourteenth Amendment" did not include the "unborn." 410 U.S., 158. To reach this conclusion *Roe* relied upon a review of clauses in which the word "person" appeared. This approach is irrelevant when it is recognized that life begins at conception (or any time before birth). For one thing, it ignores the Equal Protection Clause and recognized Due Process concepts which incorporates equal protection. See, *Regan v. Taxation with Representation*, 461 U.S. 540 (1983); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Washington v. Davis*, 426 U.S. 229 (1976). If "person" as used in the Equal Protection Clause (and therefore the due process clause) could contain classes of "persons" so that it would apply to some but not to others, it would constitute an inherent contradiction rendering the Equal Protection Clause meaningless. Any construction of "person" in the Due Process Clause can only be conducted simultaneously with *Roe's* inquiry under Section IX(B), when the life of a human being begins (see, IIA2).

a child prior to birth;[7] [2] *Grosjean* has precedential value on the issue of *stare decisis* to overrule *Roe*;[8] [3] *Grosjean* found that a corporation, although not a person under the citizenship clause included in the amendment because it was not "born" or "naturalized", was a "person" with rights under the Due Process Clause.[9]

2. The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which Requires Overruling Prior Precedent When New Facts, or New Appreciation of Old Ones, show that that Precedent Erroneously Applied Constitutional Principles.

Stare decisis is not a bar to the reexamination of *Roe* when new facts, or new appreciation of old ones, require it.[10] Of particular

[7] The difference was that the Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* Court said it could not determine the existence of the child. "Existence" becomes the most pertinent question. No theory of individual rights could justify inclusion of the legal fiction of a corporation as a "person" and deny the same right to any class of human beings.

[8] *Grosjean* construed the same word ("person") in the same Due Process Clause and overruled prior cases which excluded corporations as "persons" who enjoyed liberty interests. *See, Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 355 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; (1907) *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). it is precedent which expanded the class of "persons" to whom the Due Process Clause applies.

[9] Obviously, construction of "person" in one clause is not necessarily relevant to another. Birth, therefore, is not a requirement of persons under the due process clause. *Roe* therefore creates a tragic contradiction: corporations, created by government, cannot be denied due process; individual human beings, owing nothing to government for their existence and for whose protection government was created, are denied the unalienable right to live. Once the child's humanity is determined, Roe's analysis is irrelvant [see pt. II below].

[10] Although this case is of first impression, there are at least 174 instances in which this court has overruled, in whole or in part, its previous constitutional decisions. See: Brandeis, dissenting in *Burnet v. Coronado Oil and Gas Co.*, 285

relevance is the dissent of Justice Brandeis[11] in *Burnet v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413:

> The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from...interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause ...; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute; .. In every such case the decision,...is dependent upon the determination of...a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character. 285 U.S. at 410-411.

Whether a child before birth is a person to whom the Fourteenth Amendment applies is a mixed question of fact and law, precisely this type of determination. In reaffirming that portion of *Roe* which found that the Due Process Clause "is broad enough to encompass

U.S. 393, 406-409 n1 (1932); *Annette E. Wilson, "Stare Decisis" Quo Vadis?*, 33 Geo. L.J. 251, 254 n. 17 (1945); William O. Douglas, "stare decisis," 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Blaustein and Andrew H. Field, Overruling Opinions in the Supreme Court, 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). *Payne v. Tennessee* (Marshal, J., dissenting) 111 S.Ct. 2597, 2610, 2611 n.1 (1991). See App. A at A-1 to A-18.

[11] The Brandeis opinion has been frequently cited with approval. See *Solario v. U.S.*, 483 U.S. 435, 450 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969); *United States v. Scott*, 437 U.S. 82, 101 (1978); *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989) (Blackmun, J., dissenting).

a woman's decision whether or not to terminate her pregnancy," *Casey* expressly declined to state that *Roe* was correctly decided either on constitutional principles[12] or moral grounds,[13] and articulated a reluctance to do so [at 2812]. The Court, unable to affirm either *Roe's* correctness or its morality, affirmed *Roe* based upon *stare decisis* and perceptions of a divisive national debate. Whether the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in this case.[14]

B. RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES PROVIDE NEW FACTUAL INFORMATION WHICH DEMONSTRATES THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE CHILD EXPERIENCES

[12] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability... The matter is not before us in the first instance, and coming as it does after nearly twenty years...we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that [it] must be accorded." 112 S.Ct. at 2817. Only two Justices were willing to unequivocably state *Roe* was correctly decided.

[13] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." *Casey*, 112 S.Ct. at 2806.

[14] This court has never decided the questions here presented. But even if *Roe* can be considered to have decided the question, two critical distinctions made by Justice Brandeis apply here. First, the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to specific circumstance. Secondly, the legal question is a mixed question of fact and law.

PAIN DURING ABORTIONS IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN SCIENCE AND MEDICINE CONCERNING THE BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA which contain instructions carried out by the synthesis and functioning of proteins. In 1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. Since *Roe*, there have been many scientific, medical and technological advances and discoveries.[15] They show ignorance, errors of fact and judgment

[15] Including: (1) Recombinant DNA Technology (allows the production of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence); (3) Southern Blot (combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes)); often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger Printing (a procedure whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern; provides a test for relatedness between samples of DNA; used with PCR such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (a test tube method of amplifying DNA sequences to billions of times invented in late 1984 used to obtain information from a single cell); (8)

concerning past scientific understanding of the child's existence as a unique human being, early development, ability to react to its environment and to feel pain prior to birth. These techniques permit scientists to observe human existence and development at

Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies; detects human proteins or peptides); (10) Flow Cytometry (cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of light; produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property - used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (observes the operation of the human heart of the fetus at early stages of development); (14) Advances in electroence photography which improve detection of signals of brain activity; (15) DNA cloning (application of DNA techniques to prenatal diagnosis of certain single gene disorders introduced in 1976; DNA-based tests first applied for prenatal diagnosis of alpha Thalassemia, 1978, sickle cell anemia, 1978, beta-thalassemia, 1980, hemophilia A, 1985, hemophilia B, 1984, phenylketonuria, 1985, Duchenne and Becker muscular dystrophy, 1985, cystic fibrosis, 1986, and Huntington's disease, 1986. Boehm, C.D., et als., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (16) the use of restriction endonuclease enzymes. Martinis, J.; et als., "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P., et als., "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109; Watson, J.D., et als., *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983. Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985; Arnheim, N., et als., "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J., et als., "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N., et als., "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174; Holding, C., et als., "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H., et als., "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

a molecular level, applicable in determining genetic uniqueness, genetic diseases, sex and paternity through the analysis of human genes well in advance of gross anatomical observation.

2. The Life of Each Person Begins at Conception.

(a) Recent Developments in Science Support the Conclusion that the Life of a Human Being begins at Conception.

All of the genetic information and material necessary for the complete development of a unique human being is present at the moment of conception, when the male sperm penetrates inside the female's ovum. The child is a complete human being for life from conception and the essence of the human being is complete.[16]

Methylation of cytosine supports this conclusion. It's significance was unknown five years ago: DNA is even more sophisticated than previously suspected and its messages are written letter by letter, piece by piece. Everything to allow

[16] See LeJeune, A-108 to 140. See authorities cited in Appendix B at A-19 following petition; see also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584; Harlock E.B. Child Development 6th ed. McGraw Hill, Inc. 1978 p. 53-54; Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975 p. 183; Clark J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985, p. 99. Volpe, E.P. Biology and Human Concerns, 3rd ed. Wm. C. Brown Co. 1983, p. 20.

development of a particular human being exists at fertilization but is not read at the instant of conception. The female information acting in concert with the male information, provides the mechanism for the development of each part of the physical anatomy.[17] This information and sophisticated directed mechanisms is contained in the first cell.[18] At each stage of development cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, etc. It has been determined for instance, that the male way of "spelling" is obligatory for muscles, so that, even in the female, information from which muscles are built needs to be underlined in the male way. This understanding contradicts previous notions about fetal

[17] LeJeune at A-135 to A 138. Chaillet, J.R., et als. "Parental Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77 83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[18] It is absolutely required that in the first cell, there be both the DNA underlined by methylation in the male way and DNA methylation in the female way. This is the only cell in all of the life of a person in which those two methylation systems are present inside a cell unaltered. LeJeune at A 136-137.

development. The child is programmed for life from conception.[19]

Eight years ago Alec Jeffreys developed a technique which can determine the identity of a particular human being by using a region of a person's DNA to make a genetic "fingerprint," which uniquely identifies an individual and can be "read".[20] The Jeffreys technique has been applied to determine if two samples containing genetic material (DNA) are from the same person.[21] The techniques of fetal cell intrusion, prenatal diagnosis of disease, villus sampling, in vitro fertilization, and sexing of preimplanted embryos

[19] LeJeune at A-130 to A-137. Chaillet, J.R., et als. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H., et als., "Nuclear Transplantation in the Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L., et als., "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[20] LeJeune at A-126 to A-130; Jeffreys, et al *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Jour. of Hum. Gen., 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications,(1991).

[21] Jeffreys, A.J., et als., "Positive Identification of an Immigration Test Case Using Human DNA Fingerprints." *Nature* 317 (1985):818 819, at pp. 818 819. Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356. The technique has been successful in establishing paternity of the developing child at 9 weeks gestation, with a certainty of 360 trillion to one. Kovacs, B.W., et als., "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474 478, at pp. 474 475. The procedure established the existence of a unique human being at the time of the tests.

also establish the existence of a unique human being early in gestation.[22] Modern molecular biology has found that by the third cell division after fertilization control of growth and development has been established by the child's DNA.[23]

(b) There is a Consensus within the Scientific and Medical Communities Concerning the Biological Facts which Support the Conclusion that Life begins at Conception.

In 1981 the Sub-committee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.) published a report which specifically found, as a matter of scientific fact, that human life begins at conception:

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of

[22] Price, J.O., et als. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731; Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E., et als., *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51; Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53; Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991); Handyside, A.H., et als. 1989 "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348; Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985."

[23] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Mammalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

a human being begins at conception...today the facts are beyond dispute.Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings. *Report on Human Life Bill*, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

Some witnesses argued that the committee should not reach a conclusion about when the life of a person begins because "there was no consensus". The Sub-committee observed:

It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 ... who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one...could say that he knows of no scientific evidence that shows when actual human life exists. ...Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions..., the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. ...It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn child has intrinsic worth and equal value with other human beings. ...Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', (meaning) living beings of the human species. Rpt., Human Life Bill, *supra*, at 10, 11.

The report found that some witnesses erroneously claimed that whether the child is a person is a matter of definition, not a question of fact, and "person" can be defined any way one wishes. Only by disregarding the facts could one state that he "knows of no scientific evidence showing when actual human life exists," Report, *supra* at 11, 12.[24]

3. The Child Can Experience Pain as Early as Eight Weeks After Conception.

Dr. Bernard Nathanson testified that a child experiences pain during abortion. A vivid description which he claims supports this conclusion is found in a film made in 1984 of an actual abortion. The baby is seen moving away from the suction apparatus and then the arms and legs of the child are torn off. The mouth of the baby is open, the child is grimacing and evidencing pain. (A-167 to A-169). Recent discoveries now provide scientific evidence of this contention. With monoclonal antibody technology[25] and electro-

[24] The petitioner is unable to find a single modern reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception. Petitioner compiled a partial list of quotations from scientific and medical journals which state that life begins at conception. A-19 to A-30; A-175-185.

[25] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Elsevier (Amsterdam), 1985

physiology scientists now investigate nervous system function and development at the molecular level. We now know that the classical histological and functional criteria for defining cell types was oversimplified.[26] First described in 1985[27] was the detection of some 30 neuropeptides involved in the functioning human nervous system. Of particular relevance are substance P (chemical messenger of pain) and enkephalin (neurotransmitter involved in pain perception).[28] Their detection in samples of human tissue has been used to define and locate nervous system development and function, the complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Since *Roe* a number of generally accepted assumptions about human neurological development and ability to feel pain have been

[26] Fischbach, G.D. "An Intro. to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology In Neurology and Psychiatry*, ed. M.D. Erich, et al. New York: Raven Press, 1987.

[27] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

[28] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154. Neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses throughout human tissue.

refuted: [1] neonates were incapable of feeling pain;[29] [2] myelinated nerve fibers were necessary for pain perception (and did not form completely until after birth); [3] pain experience required pain detecting nerves connected to the thalamus and a mature brain cortex. These assumptions were based upon gross histological observations, with no knowledge of neuropeptides, or the methodologies and techniques recently developed. Only in the last decade has the concept that even normal neonates cannot feel pain been refuted[30] and that a fully developed cortical brain region was necessary for pain perception determined inconsistent with the observations of care givers for premature infants.[31]

[29] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology*, 16(2) p. 549 et seq. (1989).

[30] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[31] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347. Biochemical studies supported the observations of care givers concerning pain experiences. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These are associated with experiences of pain. Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417. It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431), and to the fetus Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B.

Based upon new studies standard medical practice changed:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[32] (Emphasis added).

With operative procedures being performed on premature babies as early as four months, it is a standard medical practice to anesthetize the child (at any age).[33] Anesthesia is used during fetal surgery as early as 18 weeks gestation.[34]

Until recently pain perception was presumed to require myeli-

Saunders Co. p. 176, at p. 176).

[32] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): at p. 1348.

[33] Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[34] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 27-30; Harrison, M.R., et als., "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49; Strickland, R.A., et als., "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 411-415. Harrison, M.R., et als., "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Longuker, M.T., et als., "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R., et als., "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411; Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176;

nated nerve fibers[35]. This is not the case even in adults.[36] Unmyelinated nerve fibers transmit pain.[37] Most fibers of the nervous system are not myelinated until two years after birth.[38] The old view of the nervous system as hard wired, projecting from nociceptors to the thalamus and then to the cortex cannot explain pain experiences.[39] Science now questions that cortical involvement is necessary for pain detection.[40] Evidence supporting the conclusion that pain can be experienced before 23 weeks gestation includes the early detection of pain associated chemicals, the timing of nerve development, the observation of

[35] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at p. 153.

[36] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

[37] Anand, K.J.S.; and Hickey, P.R. Id; Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar, 1985, p. 109; Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, 320.

[38] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[39] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

[40] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects. *Dev. Pharmocol Ther* 15(1990): 142-148, at p. 144. Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant. *Lakartidningen* 88(1991) 1880-1885.

fetal behavior and the characterization of full term infants with anencephaly. The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain.[41] The involvement of neuropeptides in pain transmission was not known when science originally theorized a sensory cortex was needed for pain perception. It is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration,[42] and was found in neuronal elements of the human cortex at eighteen weeks gestation (earliest time tested).[43] Substance "P" positive neurons and nerve fibers have been detected at eleven weeks and enkephalin positive neurons and nerve fibers at thirteen weeks gestation.[44] Substance "P" has been found as early as five weeks

[41] "The importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

[42] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

[43] Manolidis, L., Id.

[44] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

gestation and all stages thereafter.[45] The morphological substrate (the necessary pieces) for pain detection in the spinal cord exists at very early developmental stages.[46] At twelve weeks gestation the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[47] At seven weeks cutaneous sensory receptors appear, preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord:[48]

> neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adult-

[45] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S., et als., "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C., et als., "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.; Uddman, R., et als., "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399; Luo, C.B., et als., "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

[46] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[47] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., ed. Harrison et al., 92-130, Phila.: W.B. Saunders Co., 1991, at 122.

[48] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

> hood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks.[49]

Movement by the fetus away from outside stimulation,[50] and brain activity,[51] have been observed by the eighth week. Nature prepares the nervous system first so that all other systems can develop and function properly.[52] A basic sensory response loop is clearly present about eight weeks gestation.

Many behaviors characteristic of newborns are clearly present in children with anencephaly[53] (children born without a developed cortex).[54] Previously, these behaviors had erroneously been

[49] Lagercrantz, H., et als. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

[50] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[51] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[52] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life*. St. Louis: The C.V. Mosby Company, 1974, at p. 35.

[53] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[54] Shewmon, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

ascribed to cerebral hemispheric activity.[55] After birth these children breath spontaneously, have a grasp response,[56] and respond to noxious stimuli known to cause pain by avoidance, by withdrawal and by crying.[57] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, had an exaggerated sustained response to touch, evidenced spontaneous movement, and breathed spontaneously.[58] Seven of the twelve responded to a stimulation at their mouth towards the stimulus and a sucking response.[59] Spontaneous movement in the child begins between six and seven and one-half weeks gestation.[60] Stimulation of the

[55] The Medical Task Force on Anencephaly, supra.

[56] Ashwal, S., et als., "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[57] Stumpf, D.A., Med Task Force on Anencephaly."The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A., et als., "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S., et als., "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[58] Ashwal, supra.

[59] *Id.*

[60] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking 11 weeks.[61] The child 6 to 11 weeks gestation is neurologically developed at least equivalent to the twelve anencephalic children described above. They are capable of experiencing pain.

II. THE WRIT SHOULD BE GRANTED TO DETERMINE ISSUES NEVER DECIDED BY THIS COURT: [1] DO ALL HUMAN BEINGS ENJOY A RIGHT TO LIVE PRIOR TO BIRTH; AND [2] IS A CHILD'S INTEREST IN LIFE, PRIOR TO BIRTH, CONSISTENT WITH THOSE OF THE CHILD'S MOTHER.

A. THE WEIGHT OF THE LEGAL AUTHORITIES CONCLUDE THAT THE LIFE OF A CHILD BEGINS AT CONCEPTION.

The weight of legal authority supports the conclusion that the child is a human being prior to birth. New Jersey recognizes that a child's life begins at conception. See, *Smith v. Brennan*, 157 A.2d 497, 504-505 (1960); *Hummel v. Reiss*, 608 A.2d 1341, 1345-1346 (1992); *Gleitman v. Cosgrove*, 227 A.2d 689 (1967). Thirty-six other jurisdictions have found that the life of a child begins at conception.[62] Most of the states which addressed the

[61] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

[62] See authorities and quotations from each state which show they find actual life at the earliest pont examined. Appendix C at A-31 to A-57. No state, has made a specific contrary holding. In 1978 the Organization of American States made effective its Declaration of Human Rights, which states: "Every person has the right to have his life respected. This right shall be protected by law, and, in

question have found that "viability" has no relevance of a factual or legal nature.[63] It is as unjust to subject a child to a painful death before "viability" as it is after.

general, from the moment of conception. No one should be arbitrarily deprived of his life." Chapter II, Art. 4, §1. Signed by: Argentina, Barbados, Bolivia, Colombia, Costa Rica, Dominican Republic, Ecquador, El Salvador, Grevado, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Uruguay, and Venezuela. 18th Century British Common Law recognized rights in the child from the earliest moments that science could then verify the child's existence. See Appendix D at A-58 to A-71.

[63] *Smith v. Brennan*, 157 A.2d 497 (NJ) (1960), stated:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice...Whether viable or not at the time of inquiry, the child sustains the same harm...157 A.2d at 504.

This point was made in *Kelly v. Gregory*, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal. Id. at 697.

See, *Wolfe v. Isbell*, 280 So.2d 758, 761 (1973) (Ala.); *Simon v. Mullin*, 380 A.2d 1353 (1977) (Conn.); *Greater S.E. Comm. Hosp. v. Williams*, 484 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hosp.*, 367 N.E. 2d 1250, 1252-53 (1977) (Ill.); *Cheaney v. State*, 285 N.E.2d 265, 268 (1972) (Ind.); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind.App. 1989); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 453 A.2d 1198, 1206 (1983) (Md.); *Torigan v. Watertown News Co., Inc.*, 225 N.E.2d 926, 927 (1967) (Mass.); *Womack v. Buchhorn*, 187 N.W.2d 218 (1971) (Mich.); *Steggall v. Morris*, 358 S.W. 2d 577, 579-81 (1953) (Mo.); *N.D. Cen. Code*, secs. 12.1-17.02 through 12.1-17.1.06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 87 N.E.2d 334, 340 (1949) (Ohio); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 501 A.2d 1085, 1087 (1985) (Pa.); *Sinkler v. Kneale*, 164 A.2d 93, 96 (1960) (Pa.); Sylvia v. Gobeille, 220 A.2d, 222, 223-24 (1966) (R.I.); *Kalafut v. Gruver*, 389 S.E.2d 681, 683-84 (1990) (Va.); and *Puhl v. Milwaukee Auto Ins. Co*, 99 N.W.2d 163, 170 (1959) (Wis.).

B. THE RIGHT OF A PERSON TO LIVE DEPENDS ONLY UPON THE EXISTENCE OF THE INDIVIDUAL HUMAN BEING.

The child has a right to life because (1) government has no power to deny the natural and inalienable right to life from any human being and (2) the class of persons protected by the Fourteenth Amendment is coextensive with all humanity.

(1)

The natural and inalienable right to life is not derived from government but from the fact of the individual's existence, and the interest that each possesses in life.[64] The essence of the right itself prohibits denial by classification or deprivation of its inherent value. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth', and the purpose of our government is to protect the natural rights of people. This understanding was shared by both the founding fathers and the framers of the Fourteenth Amendment[65], the embodiment of this

[64] See, Constitution of the United States of America: Analysis and Interpretation, Killian, J. et al., ed. (1987), at p. 1623, prepared by the Congressional Research Services, Library of Congress, by joint resolution of congress which observes: "One's right of life existed independently of any formal guarantee of it."..at 1623; see Arkes, H. *Beyond the Constitution*, Prin. Univ. Press, (1990).

[65] Representative Thaddeus Stevens, on the date the Thirteenth Amendment was declared ratified, proclaimed:

"...equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

For Abraham Lincoln's understanding of the Declaration and its significance to life

inspiration. Representative John A. Bingham, author of section one of the Fourteenth Amendment stated:

> [T]he Constitution ...declared that "no person shall be deprived of life, liberty, or property without due process of law." By the great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because its divine spirit of equality declares that all men are created equal. Cong. Globe, 40th Cong., 1st Sess.542 (1867)(emphasis added).

Alexander Hamilton wrote:

> The principal aim of society is to protect individuals, in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved without that mutual assistance, and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws, is to maintain and regulate these *absolute rights* of individuals."... *The Papers of Alexander Hamilton*, Vol. I:1768-1778 Ed. Harold C. Syrett, Columbia Univ. Press, N.Y. (1961) "The Farmer Refuted".

James Wilson made it plain that the natural right to life extends to all, beginning as it does, from the moments of life within a mother's womb, and government is powerless to deny it:[66]

and liberty, see his first inaugural address on the relationship of the Constitution and the Declaration. See also partial list of his statements, Appendix E at A-71.

[66] But for Wilson the constitution would probably not have been adopted. McMaster & Stone's History of Pennsylvania in the Convention, p. 758. James Dewitt Andrews, observed that Curtis in his Constitutional History of the U.S. p. 309 claimed that Wilson's speech in November 1787 "is one of the most compre-

> Life, and whatever is necessary for the safety of life, are the natural rights of man. ...With consistency, beautiful and undeviating, human life, from its commencement to its close, is protected by the common law. In the contemplation of law, *life begins when the infant is first able to stir in the womb*. By the law, life is protected not only from immediate destruction, but from every degree of actual violence, ...These rights and duties are indeed, ... great pillars on which chiefly rest the criminal and the civil codes ... It would surely be preposterous to undermine their foundation, with a view to give strength or stability to what they support - to unfix what rests on the immovable basis of nature, and to place it on the tottering institutions of man. I here close my examination into those natural rights which, ..., it is the business of civil government to protect, and not to subvert, and the exercise of which it is the duty of civil government to enlarge, and not to restrain. *The Works of James Wilson*, Ed. by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II p. 314-335.

Wilson acknowledged the natural right of a father to protect his child's life and the role of government to secure the rights:

> The defense of one's self, justly called the primary law of nature, ...is not confined merely to his own person; it extends to the persons of all those, to whom he bears a peculiar relation, of his wife, of his parent, of his child ... Id., 335.

> Government, ..., should be formed to secure ... the exercise of the natural rights of its members; and every government, which has not this in view, as its principal object, is not a government of the legitimate kind. Those rights result from the natural state of man; from that situation, in which he would find himself, if no civil government was instituted. Id. at 307, 308. [See statements of founders on the natural rights. Appendix F at A-76.]

(2)

hensive and luminous commentaries on the constitution... . It drew from Washington a high encomium and gained the vote of Pennsylvania for the new government against the ingenious and captivating objections of its opponents." Bancroft is of the same opinion, Hist. of U.S., Vol. VI p. 387.

The Fourteenth Amendment itself is a source of the child's right to life. It is clear that the framers of the Thirteenth and Fourteenth Amendments equated the word "person" with "human being."[67]

Congressman John A. Bingham of Ohio, the author of Section 1 of the Fourteenth Amendment, used the word "person" interchangeably with "human being":

> The provision of our Constitution is, "no person shall be deprived of life, or liberty, or property without due process of law."...this new Magna Carta to mankind declares the rights of all to life and liberty and property; that *no person* by virtue of the American Constitution, but the majesty of American law, shall be deprived of life or liberty or property without due process of law. ...I would pass the bill, not only for the sake of giving present relief to the unfortunate *human beings* for whose special relief it is designed but I would pass this bill for the purpose as well of giving assurance...that no man shall ever, in the coming future,...be deprived of his life, of his liberty, or his property without due process of law. Cong. Globe, 37th Cong. 2d Sess. (April 11, 1862) 1683-1690. [Emphasis added].

Numerous statements show the basic assumption of the framers that "in the eyes of the Constitution, every *human being* within its sphere...from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner)

[67] Senator Lyman Trumball, Illinois, noted on the Senate floor:
I consider that under the constitutional amendment Congress is bound to see that freedom is in fact secured to every person throughout the land; he must be fully protected in all his rights of person and property; and any legislation or any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the Constitution; ... Cong. Globe 39th Cong. 1st Sess. Dec. 19, 1865 Jan. 19, 1866, 322,323.

(first emphasis added).[68] It is clear that the framers of the Amendment intended the Due Process Clause to be coextensive with the total class of all humanity, as a constitutional codification of the natural and inalienable rights.[69] Bingham stated:

> *Natural or inherent rights, which belong to all men irrespective of all conventional regulations*, are by this Constitution guaranteed by the broad and comprehensive word 'person', as contradistinguished from the limited term citizen as in the 5th Article of Amendments...that 'no person shall be deprived of

[68] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866) (Sen. Trumbull) ("any legislation or any public sentiment which deprives *any human being* in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to *every human being* within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life,... are "rights of human nature," and *the most basic "right of human nature [is] the right to exist"*); id., 1151 (Rep.Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Allen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, be he old or be he young, be he innocent or be he criminal, be he learned or be he ignorant") (emphasis added).

[69] Representative James S. Brown expressed the belief that the right to life required nothing other than human existence itself:

> *[D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual?* It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels. Cong. Globe, 38th Cong., 1st Sess. 1753 (1864) (emphasis added).

Representative Joshua R. Giddings stated:

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that *every human being* holds from the Creator an inalienable right to live ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, *that all men, without respect to complexion or condition, hold from the Creator the right to live*, who shall determine what portion of the community shall be slain? And who may perpetuate the murders? Cong. Globe, 35th Cong., 1st Sess.App. 65-66 (1858) (emphasis in original).

> life, liberty, or property'...*Cong. Globe, 35th Cong. 2d Sess. 983 (1859)*;Similar Bingham Statement at Cong. Globe, 37th Cong. 2d Sess. 1638 (1862)(emphasis added)

Senator Arthur S. Boreman explained in regard to the then recently enacted Fourteenth Amendment:

> This ... includes every person that is found within these States, and guaranties to all life, liberty ... and equal protection of the laws. ...It is not restricted to guarantying the right of a "citizen" ...but it extends to every "person", whether he has come from another State or not, to *every person residing anywhere, everywhere,* within the United States. So that while, before this amendment, if there was any question whether there were *any class of persons* in this country over whom the protection of the Constitution of the United States was not extended there cannot now be any longer any question on that subject. Cong. Globe, 42nd Cong., 1st Sess.App. 229 (1871).

Thus, the fundamental purpose of section one of the Fourteenth Amendment Due Process Clause was the protection of natural rights, and the clause was a "confirmatory reference" to the pre-existing "affirmative duty of government to protect [persons] in their natural rights."[70] The Due Process Clause is the consti-

[70] Because of the "inalienable" and "natural" character of the Due Process rights, Bingham and the other framers of the Fourteenth Amendment created the clause for the prupose and interest of reaffirming them as rights beyond the reach of government to withhold from any class of human beings. After careful examination of the antislavery background of the Civil War amendments and their legislative histories, one of the leading legal historians, Professor Jacobus tenBroek, wrote in his study of the Fourteenth Amendment:

> The Thirteenth Amendment nationalized the right of freedom. It thereby nationalized the equal right of all to enjoy protection in those natural rights which constitute that freedom. ...The Fourteenth Amendment reenacted the Thirteenth Amendment and made the program of legislation designed to implement it constitutionally secure or a part of the Constitution. ...The clause of equal protection of the laws ...(a)s the basic conception as the heart of the ... human and civil rights bills and debates upon them, as the common denom-

tutional codification of the inalienable character of life and liberty recognized by the Declaration of Independence.[71]

This Court, in speaking of the Due Process Clause, has made it clear that it constitutes the reaffirmation of the natural and inalienable rights of mankind, and the right to life is a greater right than even those deemed "fundamental," conditioned only upon the existence of those who possess the interest it protects:

> When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. ...in our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts.

inator of the drafts of the Fourteenth Amendment, as the pith and substance of section 1 in its final form, this was the meaning understood and accepted by friend and foe alike. Protection of men in their fundamental or natural rights was the basic idea of the clauses; equality was a modifying condition. *The clause was a confirmatory reference to the affirmative duty of government to protect men in their natural rights*. Jacobus tenBroek, the Anti-Slavery Origins of the Fourteenth Amendment (1951) 219-221.

[71] Bingham and the other framers of the Fourteenth Amendment saw the need to create the broad unqualified class of all humanity found in the Due Process Clause (as distinguished from the "citizenship" clause) as this reaffirmation of the natural rights because the decision in *Dred Scott v. Sanford*, 60 U.S. 393 (1857) violated the duty of government to protect the natural and inalienable rights by placing qualifications upon the class of human beings protected. For a discussion of Bingham's intent to broaden the scope of Due Process Protection, beyond the Fifth Amendment, to all humanity, see *Amar, the Bill of Rights*, 101 Yale L.J. 1193 (1992); *Nelson, The 14th Amendment*, Harvard Press (1988); *Crosskey, Politics and the Constitution II*, (1953); and *Curtis, No State Shall Abridge: The 14th Amendment and the Bill of Rights*, (1986).

> ...But the fundamental rights to life, liberty, and the pursuit of happiness, *considered as individual possessions* are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws,... For, the very idea that one man may be compelled to hold his life,...at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essense of slavery itself. ...There are many illustrations that might be given of this truth, which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. *Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions*, nevertheless it is regarded as a fundamental political rights, because preservative of all rights. *Yick Wo v. Hopkins*, 118 U.S. 356, 369-370 (1885). [Emphasis added.]

There can be no doubt, therefore, in view of the very purpose and scope of the Due Process Clause, that the only qualification for one to enjoy the natural right to life is the existence of the individual member of the human race, the object of its protection.

3. Denying Children the Right to Live on Their Status as "Unborn" is a Denial of the Equal Protection of the Law.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment may rise under the case law or common law of the state as well as under its legislative enactments. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964); *Shelley v. Kraemer*, 334 U.S. 117 (1948). Where the right to life itself is involved, derived from one's existence and being "natural and inalienable," the classification to exclude a child from

a right to enjoy an interest in life based upon a status as "unborn" requires a showing of a most compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942).

III. A WOMAN'S RIGHT MUST REFLECT AND PROTECT HER TRUE INTERESTS AND ACCOUNT FOR THE FACT THAT HER CHILD IS A HUMAN BEING AND SHE IS A MOTHER WHOSE MOST IMPORTANT PERSONAL INTERESTS ARE COMPATIBLE WITH HER CHILD'S INTEREST IN LIFE.

A. Nature and Scope of the Mother's Real Interests.

Roe identified what it perceived to be a woman's interests that the court sought to protect. However, the newly obtained scientific data concerning the child's existence and the information about the substantial harm to women due to abortion now available reveals that *Roe's* identification of a woman's protectible interests was materially deficient. Because it is the existence, nature, and "protectibility" of any interests which constitute the necessary basis for a right, their proper identification is critical.

The *Roe* Court listed five potential harms to a woman used to conclude that her *Griswold* rights include abortion. The first,

judgments when a mother's life is in danger is not implicated in this case.[72] The other concerns listed by *Roe* are: (1) maternity or additional offspring may cause a distressful life; (2) mental and physical health may be taxed by child care; (3) distress associated with an unwanted child; and (4) additional difficulties and continuing stigma of unwed motherhood. *Roe*, at 153. These may be concerns that implicate the right of privacy, but they only legitimately concern decisions before a woman becomes a mother. New Jersey does not have a compelling interest to interfere with the decision of a couple concerning conception. *Griswold, supra*. However, once a mother conceives and her child is in existence her personal interests are quite different.

Even if a woman, or couple had an "interest" in avoiding the obligations of parenthood even after the child exists, that "interest" could never be protectible in a constitutional sense. It is not sufficient that one merely state a "need", a desire, or have some expectations. There must be a legitimate claim of entitlement for which there is an independent source. It is the underlying nature

[72] It was specifically found by the court that the mother's life was not in danger and conception was the result of consensual relations. Therefore, there is no need to address this interest of a woman in this prosecution of Mr. Loce.

of the "interest" which must be examined. *Board of Regents v. Roth*, 408 U.S. 564, 569-573 (1972); *Morrisey v. Brewer*, 408 U.S. 471, 481-482 (1972); *Meachum v. Fano*, 427 U.S. 215, 224-227 (1976); *Montanye v. Haynes*, 427 U.S. 236, 242 (1976).

In *Roth, supra*, this court explained:

> ...the range of interests protected ... is not infinite ... We must look to see if the interest is within the Fourteenth Amendments' protection of liberty ..." 408 U.S. at 569, 571.

The determining factor on which the protectibility of an interest turns is the precise nature underlying the interest, not that there is a "greivous loss", but an interest of the protectible kind. *Morrissey v. Brewer, supra*, 481; *Bd. of Reg. v. Roth, supra*, 569-574. The interest must have a source in law or the nation's history or tradition. *Meachum v. Fano, supra*, 224-227; *Mantanye v. Haynes, supra*, 242; *Smith v. Organ. of Foster Fam. for E & Reform*, 431 U.S. 816, 839-847; 857-859 (1977); *Ingrahm v. Wright*, 430 U.S. 651, 672-673; *Codd v. Velger*, 429 U.S. 624-628 (1977); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 1001-1003 (1984).

The true nature of a woman's interest must be scrutinized, in view of the fact of the child's existence and the harms to a mother which have come to light during two decades of experimentation with abortion. No matter which rhetoric is used to characterize a

mother's or couples' interest to avoid the obligations of parenthood once the child exists, the "interest" [in "abortion" or "choice"] is, in fact, an "interest" in terminating the life of a human being. The interests found in *Roe* no more justify terminating the life of the child before birth then they would two days after birth to avoid the stress of child rearing. *See, Thornburgh v. A.C.O.G.*, 476 U.S. at 787-795 (White, J., dissenting).[73]

When a woman or couple intentionally conceive or conceive through voluntarily conduct, the interests listed in *Roe* are not

[73] If these were truly reasons to abort a child then a father would have a coexisting right to demand an abortion. All of these [except "maternity"] are experienced by him even when the child is born out of wedlock. The fact that a mother is the parent who carries the child does not alone give her the singular power over life and death. Both parents are equal contributors to life, with equal obligations following birth. The significant contribution of a mother who bears the burden of maternity is fairly and justly reflected in the New Jersey law which vests in her the right to choose to be the primary custodian of the child if the parents are separated at birth and disagree on custody. *Baby M*, 537 A.2d 1227, 1261 (1988). The fact that she carries and bonds with the child directly bears upon the health and welfare of the mother and child following birth, not the power over actual life itself. See IIIC below.

Casey elaborates on the concern pertaining to maternity:

> "The mother who carries a child to term is subject to anxieties, the physical constraints, to pain that only she must bear." *Casey*, 112 S.Ct. at 2807.

But *Casey* does not suggest that this justifies taking the life of another human being. *Casey* recognizes that the interest in protecting the life of the unborn at "viability" is greater than that of the mother. Yet "viability" is precisely when these anxieties, physical constraints and pains are realized in their most acute form. *Casey* recognized that the responsibility for the avoidance of this experience, if desired, rests upon the mother before they are realized. The same reasoning applies before conception. *Casey* observes that cutting off the mother's right to abortion has a "sense of fairness"... "In some broad sense it might be said that a woman who fails to act before viability has consented to the state intervention on behalf of the developing child." 112 S.Ct. at 2817.

merely irrelevent, they no longer exist. The key difference is the fact that the child exists. Even if a mother had an "interest" in terminating her child's life, it is not protectible because it is perfectly repugnant to all of her traditionally recognized and protectible interests, including her interests in her child's actual life, and her relationship with her child [see, IIIC below].

B. Identifying the Real Nature of the Life in Question.

The fact that the child is a human being is pertinent to both the child's personal interest in actual life, and the interests of the mother. The court's prior inability to determine when the life of the child began impaired its ability to accurately identify the true interests of the critical participants. As a result, ever since *Roe* declined to find when life began, the Court has labored under the disability of having never defined the nature of the life which was the subject of its opinions and the basis for an "interest" of the states. This failure and the resultant and substantial uncertainty surrounding the nature of the life is reflected in the language of the Court and imprecise definition of the "state's interest" and those of the mother. The Court most often refers to the child as "potential life" and the state's interests as one in 'potential life'. *See, e.g., Roe*, 410 U.S. at 163 (1973); *Webster v. Reproductive*

Health Services, 492 U.S. 490 (1989).[74] Nowhere is this failure and uncertainty more apparent than in *Casey*:

> Abortion is a unique act. It is an act fraught with consequences for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and depending on one's beliefs, for the life or potential life that is aborted. 112 S.Ct. at 2807.

Either this is a human being or it is not. It is not a "belief", religious or otherwise, but a question of fact. It affects the nature of a mother's interest. Whether or not she is killing her own child is material, if not decisive.

C. Once a Woman Conceives and her Child Exists her Personal Interests are Consistent with the Interests of her Child.

Once a woman conceives she has at least seven interests not identified in *Roe*, none of which are inconsistent with her child's interest in life, and all conflict with the *Roe* "interests." The first

[74] In *Casey* the Joint Opinion refers to the child as: "the life or potential life" (112 S.Ct. at 2807); "postconception potential life" (at 2811); "fetal life" (at 2811); "the life of the unborn" (at 2816); "life" (at 2816); "life or potential life of the unborn" (at 2817); "potential life" (at 2817); and "the life of the fetus that may become a child" (at 2804). The Chief Justice refers to the child as "a fetus" (at 2859); "unborn human life" (at 2867); "unborn life" (at 2868) and "unborn child" (at 2871); Justice Stevens retains the use of "potential life" (at 2840, 2841); Justice Blackmun refers to "potential life" (at 2847) and "prenatal life" (at 2847). Justice Scalia observes on this:

> The whole argument of abortion opponents is that what the Court calls the fetus and what others call the unborn child *is a human life*. Thus, whatever answer *Roe* came up with after conducting its "balancing" is bound to be wrong, unless it is correct that the human fetus is in some critical sense merely potentially human. Scalia, J. dissenting, 112 S.Ct. at 2875.

three, although distinct, are closely related. First, she has a personal interest in her protected relationship with her child. Second, she has a personal interest in the child's life. Third, she has an interest in defending and protecting her child's rights. *Lehr v. Robertson*, 463 U.S. 248 (1983); *Santosky v. Kraemer*, 455 U.S. 745 (1982); *Quillion v. Walcott*, 434 U.S. 246 (1978); *Matter of Baby M*, 537 A.2d 1227 (N.J. 1988); *D.Y.F.S. v. A.W.*, 512 A.2d 438 (N.J. 1986). The fact that the child is a human being distinguishes two separate sets of interests: those which form the basis for her fundamental right to companionship with her child — and those which form the basis of her *Griswold* rights. Her relationship with her child is protected during pregnancy. C.F. *Lehr, supra*. No government could demand she terminate that relationship without due process. *Santosky, supra*. The nature of this right is to preserve the life of the child and their relationship. It is not possible that her companionship interest, because of its nature, entitles her to terminate the child's life because the existence and preservation of that right hinges on the child's welfare.[75] A mother's rela-

[75] The nature of the mother's right to the protection of her relationship with her child is best understood by examning the constitutional principles concerning the termination of those protected rights. Two areas of inquiry determine whether a particular termination is constitutional: (a) whether the parent possesses a

tionship with her child during pregnancy is the most intimate, most unique, most important, and one most worthy of protection. Although the mother and child are two separate persons their relationship is so intimate that the unique bond between them, beginning as it does in utero,[76] creates a human relationship which

constitutional right; and (b) whether the grounds for termination satisfy Due Process criteria. In both inquiries, the welfare of the child is the most critical determinant. The grounds for termination have always been related to what is best for the child: only if continuing the relationship would be harmful to the child, could a termination take place. *E.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *see Stanley v. Illinois*, 405 U.S. 645 (1972); *Lehr v. Robertson*, 463 U.S. 248 (1983). A second inquiry is whether a parent has a constitutionally protected relationship with the child. Here too, the welfare of the child is a critical factor. A father of a child born out of wedlock enjoys a constitutionally protected relationship with his child. *Stanley v. Illinois*, supra. But, a natural father is not always recognized as having a constitutionally protected relationship. *See Quilloin v. Walcott*, supra; *Lehr v. Robertson*, supra; *Michael H. v. Gerald D.*, 491 U.S. 110 (1989). *Quilloin, supra,* explains under what circumstances the Court would recognize an unwed father's right:

> We have little doubt that the Due Process Clause would be offended 'if the state were to attempt to force the breakup of the natural family, over the objection of parents, and their children without some showing of unfitness and for the sole reason to do so was thought to be in the child's best interest'. *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-863, (1977). But this is not the case in which the unwed father at any time had, or sought, actual or legal custody of his child. Nor is this a case in which the proposed adoption would place the child with a new set of parents with whom the child had never before lived. Rather, the result of the adoption in this case is to give full recognition of the family already in existence, a result desired by all concerned, except the appellant. 434 U.S. at 255.

This statement explains the difference in treatment of fathers' rights in *Lehr v. Robertson, supra*. In *Quilloin, Lehr* and *Michael H.* however, the dominant reason for the Court's refusal to recognize the father's rights was because there was an existing family which sought to protect the child's welfare. Therefore, the recognition of a parent's rights relates to and depends upon whether a family exists or the mother competes to protect the child's welfare.

[76] Recent studies demonstrate that a mother's bond with her child [and the child's attachment to her] begins during pregnancy and even at its early stages. Klaus and Kennel, "The Family During Pregnancy," in *Parent Infant Bonding*, 1-2

may be the most rewarding in the human experience. Preservation of the benefits, beauty, and joy of that relationship is one of the greatest interests a woman possesses in all of life.

The fact that she is the parent who carries the baby clearly distinguishes her circumstance (and her role in reproduction) from that of the father. But the fact that her contributions are different from (and at this age of the child, outweigh) his do not make her interest inconsistent with those of the child. If anything, it creates the cherished right to protection of their relationship. The fact that the mother is the parent who carries the child has always been

(1982); Lumely, "Attitudes to the Fetus Among Primagravidae," *Australian Pediatric J.*, 106, 108 (1982). This unique mother-child relationship, with the developing bond and attachment benefits both the child and mother. It is the basis for the child's subsequent attachment and development of a sense of self. Klaus and Kennell, at 3. At the same time the bond helps the mother to transfer her interest from herself to her child, and therefore prepares her for her unique role in the child's life. Sugarman, "Parental Influences in Material Infant Attachment," 47 *Am. J. Orthopsychiatry* 407 (1977). This accounts for the the fact that a mother is the principle attachment figure for a child. Bowlby, "Attachment and Loss," Vol. I *Attachment*, at 304 (1969). Studies have demonostrated the subjective and conscious awareness that mothers have concerning their bonding with their children during pregnancy. In the second trimester 63% of women expressed attachment with the child and 92% expressed such atachment during the third trimester. Some women even expressed the attachment during the first trimeser. Lumely, "Attitudes to the Fetus Among" *Austrailian Pediatric J.*, 106, 108 (1982). Mothers talk to the fetus and stroke it. Id. at 109. The ability of the mother to make a correct assessment of the size, shape and movement of the baby increased as the pregnancy proceeds as does the sense of the separateness of the baby. Id. at 108. Increased sensitivity to the child follows experience of "quickening" when women can feel the baby move. Klaus and Kennell, *supra*, at 13; Leister, "Physhological Effects of Motherhood," at 76 (1980).

considered material to her rights following birth when she is competing for custody. This is our understanding of *Lehr*. This fact relates to human bonding and impacts upon the health of both the mother and child. New Jersey law gives the mother the right to choose to be the primary custodian when the natural parents do not live together and disagree on custody at the time of birth. *Matter of Baby M,* 537 A.2d 1227, 1261 (1988). Therefore, the fact that a mother physically carries the child relates to her rights when she seeks to protect the child. To suggest that that fact supports a right to kill the child is contrary to constitutional principles dealing with termination rights.[77] The privacy right to preserve the mother-child relationship child cannot co-exist with the right to kill the child. They are repugnant.[78]

[77] This court's opinion in *S.E. Pa. v. Casey, supra*, is not inconsistent with this understanding of the mother's interests because *Casey* never addressed the humanity of the child. *Casey* only examines the quesiton of whether a father may require his "consent" for abortion. *Casey*, 112 S.Ct. at 2830-31. Since a father's *only* interest is in preserving the child's life and their relationship he never has an interest in an abortion, so his permission could never be required. But any analysis of *Roe* and *Casey* forming grounds to terminate a father's rights, or refusing to recognize them at all, which is not consistent with the welfare of the child is at odds with precedent defining parental rights and the result of this Court never having determined when the life of the child begins. (See footnote 78).

[78] The fact that a mother's interests in her child's life and her relationship with the child prior to birth are repungnant to a perceived "interest" in killing the child [and therefore mutually exclusive] through abortion is reflected in some modern feminist literature. In her book, *Sacred Bond*, Times Books, Random House, Inc., New York, 1st ed., 1988, Phyllis Chesler observed this conflict, stating that the

Fourth, she has an interest to avoid the risk of physical and psychological harms to which she is subjected when abortion is used to satisfy interests that may have existed only before she becomes a mother. This nation's experimentation with abortion has revealed impressive evidence of profound risk of physical and psychological harms to which a mother is subjected when she acts against her interests by taking her child's life. It is now clear that destruction of the mother-child relationship by the mother taking the life of her own child places a woman at subsantially increased

"sacred bond" of a mother and child cannot be sacrificed for a right to destroy that relationshp.

> Some feminists say: "If women can't do what they want with their bodies, then we'll lose our right to abortion and pay equity." I hope not, but must women give up the right to keep our children -- a right we don't yet have -- for the right not to bear children?
>
> Some feminists say: "Patriarchal motherhood has enslaved and destroyed women-who in turn have emotionally wounded their own children. There's nothing sacred about biological reproduction or motherhood. They're examples of devalued and alienated unpaid labor. Let's organize for wages and better working conditions and get men involved in mothering. At the very least, male mothers will upgrade women's status as childcare workers."
>
> *Perhaps, but how can we deny that women have a profound and everlasting bond with the children they've birthed; that this bond begins in utero; that it is further strengthened by the experience of childbirth, breast-feeding and primary childcare, and by the socialization into motherhood that women (not men) receive?*
>
> *How can we deny that children bond with their birth mothers in utero*, and that children suffer terribly in all kinds of ways when this bond is prematurely or abruptly terminated?
>
> Acknowledging these truths does not doom women to the status of surrogate uteruses-or men to the status of sperm donors. Patriarchal "civilization" has already done so. *Sacred Bond*, at 22-23. [Emphasis added.]

risk for [1] breast cancer;[79] [2] severe depression;[80] [3] lowered

[79] Russo, J., Russo IH (1980) "Susceptibility of the Mammary Gland to Carcinogenesis II. Pregnancy Interruption as a Risk Factor in Tumor Incidence" *Am J Pathol*, 100:497-451; Ownby, H.E., et als. (1983) "Interrupted Pregnancy as an Indicator of Poor Prognosis in TI, 2, No, Mo Primary Breast Cancer" *Breast Canser Res Treat*, 3:339-344; Olsson H., et al (1991) "Proliferation and DNA Ploidy in Malignant Breast Tumors in Relation to Early Oral Contraceptive Use and Early Abortions" *Cancer*, 67:1285-1290; Olsson H., et al. (1991) "Her - 2/neu and INT2 Proto-oncogene Amplification in Malignant Breast Tumors in Relation to Reproductive Factors and Exposure to Exogenous Hormones" *J Nat Cancer Inst*, 83:1483-1487; Clark, R.M., et als. (1989) "Breast Cancer and Pregnancy: The Ultimate Challenge" *Clin Oncol Royal Coll Radiol*, 1:11-18; Salber, E.J., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Boston" 1965-66, *J Nat Cancer Inst*, 43:1013-1024; Lowe C.R. et als. (1970) "Breast Cancer and Reproductive History of Women in South Wales" *Lancet*, i:153-156; Ravnihar B., et als. (1971) "Epidemiologic Features of Breast Cancer in Slovenia" 1965-1967, *Eur J Cancer*, 7:295-306; Paffenbarger R.S., et als. (1980) "Characteristics that Predict the Risk of Breast Cancer Before and After the Memopause" *Am J Epidemiology*, 112:258-268; Segi M., et als. (1957) "An epidemiological Study on Cancer in Japan" *GANN* 48 Suppl: 1-43f; Wynder E.L., et als. (1960) "A Study of the Epidemiology of Cancer of the Breast" *Cancer*, 13:559-601; Valaoras V.G., et als. (1969) "Lactation and Reproductive Histories of Breast Cancer Patients in Greater Athens" 1965-67 *Int J Cancer*, 4:350-363; Yuasa S., et als. (1970) "Lactation and Reproductive Histories of Breast Cancer Patients in Tokyo, Japan" *Bull World Hlth Org*, 42:195-204; Lin, T.M., et als. (1971) "Epidemiology Characteristics of Cancer of the Breast in Taiwan" *Cancer*, 27:1497-1504; Soini I. (1977) "Risk Factors of Breast Cancer in Finland" *Int J Epidemiology*, 6:365-373; Choi N.W., et als. (1978) "An Epidemiological Study of Breast Cancer" *Am J Epidemiology*, 107:510-521; Toti A., et als. (1980) "Possible Indication of Breast Cancer Risk Through Discriminant Functions" *Cancer*, 46:1280-1285; Kelsey, J.L., et als. (1981) "Exogenous Estrogens and Other Factors in the Epidemiology of Breast Cancer" *J Nat Cancer Inst*, 67:327-333; Pike, M.C., et als. (1981) "Oral Contraceptive Use and Early Abortion as Risk Factors for Breast Cancer in Young Women" *Br J Cancer*, 43:72-76; Remennick, L (1990) "Induced Abortion as a Cancer Risk Factor: A Review of Epidemiological Evidence" *J Epidemiol Community Health*, 44:259-264; Vessey, M.P., et als. (1982) "Oral Contraceptive Use and Abortion Before First Term Pregnancy in Relation to Breast Cancer Risk" *Br J Cancer*, 45:327-331; Brinton L.A., et als. (1983) "Reproductive Factors in the etiology of Breast Cancer" 47:757-762; Ewertz M., et als. (1988) "Risk of Breast Cancer in Relation to Reproduction Factors in Denmark" *Br J Cancer*, 58:99-104; Yuan, J-M, et als. (1988) "Risk Factors for Breast Cancer in Chinese Women in Shanghai" *Cancer Res*, 48:1949-1953; Rosenberg, L., et als. (1988) "Breast Cancer in Relation to the Occurrence and Time of Induced and Spontaneous Abortion" *Am J Epidemiol*, 127:981-989; Howe, H.L., et als. (1989) "Early Abortion and Breast Cancer Risk Among Women Under Age 40" *Int J Epidemiol*, 18:300-304; Nishiyama, F.

self esteem;[81] [4] suicide, suicidal ideation, attempted suicide and

(1982) "The Epidemiology of Breast Cancer in Tokushima Prefecture" *Shikoku Ichi (Shikoku Med J)*, 38:333-343 (Tr. Frank C., Farnham Co., Philadelphia); Dvoirin, V.V., et als. (1978) "The Role of Reproductive History in Breast Cancer Causation" in *Methods and Results of Studies of Breast Cancer Epidemiology*, Tallinn, 53-56 (in Russian, reported by Remennick, 1990 [ref #24]); Lindefors-Harris B-M, et als. (1989) "Risk of Cancer of the breast After Legal Abortion During the First Trimester: A Swedish Register Study" *Br Med J*, 299:1430-1432; Lindefors-Harris B-M, et als. (1991) "Response Bias in a Case-control Study: Analysis Utilizing Comparative Data Concerning Leagal Abortions From Two Independent Swedish Studies" *Am J Spidemiol*, 134:1003-1008; Adanii H-O, et als. (1990) "Absence of Association Between Reproductive Variables and the Risk of Breast Cancer in Young Women in Sweden and Norway," *Brit J Cancer*, 62:122-126; Parazzini F., et als. (1991), "Spontaneous and Induced Abortions and Risk of Breast Cancer," Br J Cancer, 53:281-284; Harris J.R., et als. (1992) "Breast Cancer", *N Engl J Med*, 327:319-328.

[80] Major, B. et als. (1985) "Attributions, Expectations and Coping with Abortion," in *Journal of Personality & Social Psycology*, 48, 3, 585-599; Louis Harris & Assoc. (April 20, 1993), "The Health of American Women," commissioned by the *Commonwealth Fund*; David, et al., "Postpartum and Postabortion Psychotic Reactions," in *Family Planning Perspectives*, (1981) 88-91; Reardon, *Aborted Women - Silent No More*, (Chicago; Loyola University Press, 1987); Reardon "Criteria for Identification of High Birth Abortion: Analysis of an in-depth survey of 100 aborted women "presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver.

[81] Russo, N. & Zierh, K. (1992) "Abortion, Childbearing and Women's Well-Being," in *Professional Psychology: Research & Practice*, 23, 4, 269-280; Speckland, A. (1987), *Psycho-Social Stres Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984), "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Journal of Psychiatry*, 148, 4, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of Counseling & Development*, 69, 377-379; Zolese, G. & Blacker, C. (1992) "The Psychological Complications of Therapeutic Abortion," *British Journal of Psychiatry*, 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion" *American Psychologisst*, 47, 10, 1194-1024; Wilmoth, G., de Alteriis, & Bussell, D. (1992) "Prevalence of Psychological Risks Following Legal Abortion in the U.S.: Limits of the Evidence," *Journal of Social Issues*, 48, 3, 37-66; Speckland A. (1987) *Psycho-social Stress Following Abortion*, Kansas City, MO: Sheed & Ward; Bradley, C. (1984) "Abortion and Subsequent Pregnancy," in *Canadian Journal of Psychiatry*, 29, 494; Open Arms, (1993) *Abortion Information Survey Project*, Columbia, MO: P.O. Box 1056; Akron Pregnancy Service (1993), *Post-Abortion Research Project*, Akron, Ohio: 105 E. Market St.

paranoid ideations;[82] [5] drug or alcohol abuse;[83] [6] negative impact on marital relations;[84] [7] negative feelings regarding subsequent pregnancies and obsessive thoughts about replacement children;[85] [8] stress disorders;[86] [9] sexual dysfunctions;[87]

[82] Campbell, et als. (1988) "Abortion in Adolescence," in *Adolescense,* 23, 92, 813-823; Garfinkel, B., et als. (1986) "Stress, Depression and Suicide: a Study of Adolescents in Minnesota," in *Responding to High Risk Young,* Minnesota Extension Service: University of Minnesota; Reardon, D. (1987), *Aborted Women: Silent No More,* Westchester, ILL: Crossway; Vaughan, H., *Canonical Variates of Post-Abortion Syndrome,* Portsmouth, N.H.; Institute for Aborting Recovery & Research; 1991; *Open Arms AIS Project, supra., Akron Pregnancy Service Survey, supra.*; Freeman, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions" in *Obstetrics & Gynecology,* 55, 5, 625-635.

[83] Plant, M. (1985) *Women, Drinking and Pregnancy,* London; Tavistock Publications; Reardon, D. (1987) *Aborted Women: Silent No more, supra.; OPEN Arms (1993), Abortion Information Survey Project, Columbia, MO: P.O. Box 1056; Reardon, "Criteria for the Indentifiable High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 aborted Women," presented at the 1987 Paper Seminar of the Association for Inter-Disciplinary Research, Denver.*

[84] Vaughan, H. (1991) "Canonical Variates of Post Abortion Syndrome," Portsmouth, NH, Institute for Abortion Recovery and Research; Wallerstein, et als. (1972) "Psychosocial Singular of Therapeutic Abortion in Young Unmarried Women" in *Archieves of General Psychiatry Vol. 27.*

[85] Bradley, C. (1984) "Abortion and Subsequent Pregnancy" in *Canadian Journal of Psychiatry,* 29, 494; Speckhard, A. (1987) *Psycho-Social Stress Following Abortion,* Kansas City, MO; Sheed & Ward; Pare and Raven, "Follow-up of Patients Referred for Termination of Pregnancy," *The Lancet* (1970) Vol. I pg. 35-638; Wallerstein, et al., Id. Reardon, *Aborted Women - Silent No More,* Chicago: Loyola University Press, 1987; Vaughan, Id.

[86] Akron Pregnancy Service (1993), *Post-Abortion Research Project,* Akron, OH; 105 E. Market Street; Russo, N. & Zierk, K. (1992) "Abortion, Childbearing and Women's Well-Being." *Professional Psychology; Research & Practice,* 23, 4, 269-280; Dagg, P. (1991) "The Psychological Sequelae of Therapeutic Abortion," *American Jouranl of Psychiatry,* 148, 5, 578-585; Armsworth, M. (1991) "Psychological Response to Abortion," *Journal of counseling & Development,* 69, 377-379; Zolese, G. & Blacker, C. (1992) "The Psychological Complications of

[10] grief reactions;[88] [11] nervous and sleep disorders;[89] [12] and other physical and psycological injuries too numerous to detail.[90] Fifth, she has an interest in preserving her personal dignity in her role as mother, a role that does not simply "ennoble" her, or merely enrich her life, but one which distinguishes her as unique as the mother of the unique person she carries. A legal

Therapeutic Abortion," *British Journal of Psychiatry,* 160, 742-749; Adler, N., et als. (1992) "Psychological Factors in Abortion," *American Psychologist,* 47, 10, 1194-1204; Hanley, et als. (1992) *Woman Outpatients Reporting Continuing Post-Abortion Distress: A Preliminary Inquiry,* Paper Presented at the Eighth Annual Meeting of the International Society for Traumatic Stress Studies, Los Angeles; Barnard, C., *The Long Term Psychosocial Effects of Abortion,* Portsmouh, N.H., Institute for Abortion Recovery & Research, 1990.

[87] Reardon, *Aborted Women - Silent No More, supra*; Franache, *The Ambivalence of Abortion,* New York, Random House, 1978; Speckland, H. (1987); *Psycho-Social Stress Following Abortion,* Kansas City, MO: Sheed & Ward.

[88] Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" Omega 18:1 (1987), 1-12; Reardon, *Aborted Women - Silent No More, supra;* Reardon, "Criteria for Identification of High Risk Abortion Patients: Analysis of an In-Depth Survey of 100 Aborted Women," supra.

[89] Ashton, J. (1980) "The Psychosocial Outcome of Induced Abortion," in *British Journal of Obstetrics & Gynecology,* 87, 1115-1622; Akron Pregnancy Service, supra; Freemard, et als. (1980) "Emotional Distress Patterns Among Women Having First or Repeat Abortions," in *Obstetrics & Gynecology,* 55, 5, 625-635.

[90] Many of these harms are inherent to abortion or the breaking of the mother-child bond developed during pregnancy, such as the grief reactions in abortion. See, generally, Peppers, L. "Grief and Elective Abortion: Breaking the Emotional Bond?" *Omega* 18:1 (1987), 1-12; the other injuries cited above are inherent in the abortion conduct because it acts against the natural interests of the mother. The study in two Canadian provinces which found that 25% of "aborted" women made visits to psychiatrists as compared to 3% of the control group is typical. See, Badgley, et als. (1977) Report of the Committee on the Operation of the Abortion Law, *Ottowa: Supply and Services,* 313-321. See Krail pet. pt. II.

policy which denigrates her role in carrying her child is not one which actually protects her interests but destroys them. There is a difference between the experiences of women and men in the role of reproduction that must be accounted for to define a women's true interests.[91] The expectation that women conform in their conduct in the ways expected of men ignores and denigrates a mother's experience during pregnancy.[92] To pretend that she can deny her true experience to meet these expectations is cruel. To establish a formal policy which chooses to protect the destruction of her relationship with her child over a policy which unwavingly protects it is a denigration of women, because a policy

[91] A woman's sense of personhood, personal satisfaction, pleasure, effectiveness and a sense of worth is most often grounded in personal relationships and a sense of connection with others. This sense of connection leads to an increase in vitality, aliveness and energy. Women also have a heightened sense of empathy and this ability enhances rather then diminishes them. Miller, *New Physiology of Women* (1986). Women's focus on their relationships to others, an important aspect of their lives, is associated with the mother-child relationship. She has a strong interest in preserving this aspect of herself. Blenesky, Clinchy, Goldberger and Tarule, *Women's Ways of Knowing*, at 1-7 (1986). Gilligan, *In a Different Voice*, at 23 (1982), writes that the elusive mystery of women's development lies in its recognition of the continuing importance that attachment has in the human life cycle. Gilligan, supra, at 9-10, noted that there are differences in the ways men and women define themselves in relationship to others. A society which offered woman the "remedy" of abortion in reality has an unjustified expectation that she act in a detached manner characteristic of men, at the expense of her own interest, dignity, and her relationship with her child.

[92] A male dominated society artificially prizes autonomy and independence; a women's development and role as mother is denigrated and devalued in such an environment. Miller, *What do We Mean by Relationships*, 22 Work in Progress, Stone Center, Wellesly College 1, 16 (1986).

which assumes it is a distressing experience to be a mother is a statement that it is bad to be a woman.

Sixth, she has an interest in not being exploited by pressures which destroy her interests as mother as a way to satisfy the interests of third parties, including the State, the father, and others, who have personal interests inconsistent with those of mother and child. Abortion is an exploitation of women. It treats the mother as if she is not a whole woman. It assumes she can be sexually exploited and act as though she is not, in fact, a mother. It demands she detach herself from her experience and her bond, love, and sense of duty to herself and her child.[93] It expects a mother to prevent the bonding process despite the fact this natural process is both psychological and physiological.[94] It *uses* the

[93] Feminists who oppose abortion see it as a male institution which encourages, even forces a woman to act irresponsibly, against her self-interest, her dignity and self-worth, just as men often do in reducing women as "sport" and "entertainment." Newman, B., "Why Post-Modern Patriarchy Loves Abortion," in *Sisterlife,* (1993) Vol. XIII, 1, p.1, 5; great feminist leaders like Susan B. Anthony, deplored abortion as an exploitation of women, calling it "child murder," [The Revolution, 4(1):4 (July 8, 1869)] and the result of the use of women as sport [Anthony, Marriage and Maternity," *The Revolution,* 4 (1)4, 1869].

[94] "Men tend to take abortion lightly; they...fail to realize the values involved. The woman who has recourse to abortion is disowning feminine values, her values...Women learn to believe no longer in what men say...the one thing they are sure of is the rifled and bleeding womb, these shreds of crimson life, this child that is not here." Simone deBeauvoir, *The Second Sex*, 1952; "Abortion is violence: a deep, desperate violence inflicted by a woman upon, first of all, herself. It is the offspring, and will continue to be the accuser, of a more

mother as a sexual object without regard for the harm abortion can cause her.[95] It allocates all of the risk, guilt, physiological and physical pain to her and further isolates her in her distress in circumstance of unplanned or imprudent pregnancy by placing the responsibility of killing her child entirely upon her.[96]

Perhaps worst of all is the fact that a mother is deprived of any meaningful consent to the destruction of her cherished and sacred relationship with her child. Where mothers express their intentions during pregnancy to terminate their relationships with their children, no state permits enforcement of a mother's oral or written statement to surrender her child until after birth because, in every instance, regardless of the counseling, her decision before birth, is uninformed. New Jersey has found that any promise or decision by a mother to terminate her relationship with her child made before

pervasive and prevalent violence, the violence of rapism." Adrienne Rich, *Of Women Born*, 1976.

[95] "It is typical of the contradictions that break women's hearts that when they avail themselves of their fragile right to abortion they often, even usually, went with grief and humiliation to carry out a painful duty that was presented to them as a privilege. Abortion is the latest in a long line of non-choices that begin at the very beginning with the time and the place and the manner of lovemaking..." Germaine Greer, *The New Republic,* interview, October 5, 1992.

[96] See discussion of psychiatric harm above. Dr. Alice Ruben Stockharm wrote of this isolation. See, Stockharm, A., *Takology* (1887), p. 247.

birth is uninformed as a matter of law. *Matter of Baby M*, 537 A.2d 1227, 1247-1248 (N.J. 1988). If that is true where a mother gives birth, it is more so where she irrevocable kills her own child and must live with the consequences. Abortion also fails to recognize the reality that most women who originally intend to surrender children to adoption (because of the *Roe* "interests") change their mind. Abortion is repugnant to every policy that New Jersey has adopted to protect the relationship a woman has with her child-policies created to protect her interests [see Krail Pet. IID]. She is subjected to these harms only to accommodate society's sexual exploitation because it was easier for that society to create an industry of abortion than to correct the underlying exploitive conduct.

Seventh, she has an interest in having the law extend to her dignity and respect by recognizing that she is capable of competing equally, competitively and with dignity in the commercial and professionial life of this nation without being denigrated by specially and artificially crafted "principles of law" which ingrain the belief that she is inherently inferior because she cannot find fulfillment without an exclusive "right" to terminate the life of her own child.

Once the child exists a mother's interests are compatible with

the child's personal interest in actual life. If it were erroneously perceived that a mother had interests, after the child comes into existence, such as those set forth in *Roe*, they would not be constitutionally protectible. A parent's willingness to surrender the benefits of her relationship with the child to avoid the obligations of parenthood cannot rise to the level of a protectible interest if avoidance of the responsibility is accomplished by the termination of the child's life. That it is convenient, easier or less expensive to terminate the life of the child during any stage of pregnancy "cannot stand against the preciousness of a single human life." *Gleitman v. Cosgrove*, 227 A.2d 689, 693 (1967). The "interest" in killing a child is simply unprotectible in the constitutional sense, and mutually exclusive with a mother's constitutionally protected interest in her child's life. All of New Jersey's longstanding policies to protect the life of the child and the mother's relationship with the child precludes recognition of an "interest" in the termination of the child's life as protectible. [See, Krail pet. IID].[97]

[97] Even if a woman actually has a protectible "interest" to terminate her child's life, when balanced against the child's interest in actual life, the child's life would have to be preserved because the interests are in conflict and the child would suffer the greatest loss. Compare, *Zacchini v. Scripps - Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Rowan v. U.S. Post Office Department*, 397 U.S. 728 (1970); *Runyon v. McCary*, 427 U.S. 160 (1976).

IV. MR. LOCE HAS THE STANDING TO RAISE THE RIGHTS OF HIS CHILD. CONVICTION OF HIM UNDER THE FACTS OF THIS CASE IS AN UNCONSTITUTIONAL DEPRIVATION OF THE RIGHTS OF BOTH THE CHILD AND MR. LOCE.

Mr. Loce's relationship with his child is unique because both have the interwoven common interest in the child's life. The child's interest in life coincides with the father's interest to defend his child's life. The fact of the child's existence and the nature of the child's rights, given Mr. Loce's standing in regard to them, render Mr. Loce's conviction an unconstitutional deprivation of the child's rights. See e.g., *Griswold v. Connecticut*, 381 U.S. at 481.[98]

"Standing" is an element of the "adverse parties" requirement of Article III and concerns whether the party seeking relief has:

> Alleged such a personal status in the outcome of the controversy as to assure that concrete adverseness which sharpens the preservation of issues upon which the court so largely depends for illumination of difficult constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

Standing relates to the inextricable connection between the rights of both father and child, because they relate to the harm each shall endure, and the right each separately possesses to have

[98] e.g. see also, *Truax v. Raich*, 239 U.S. 33 (1915) (an employee may assert the rights of his employer); *Pierce v. Society of Sisters*, 268 U.S. 510 (the owners of private schools could assert the rights of potential pupils and their parents); and *Barrows v. Jackson*, 346 U.S. 249 (a white defendant, party to a racially restrictive covenant, could raise the rights of prospective negro purchasers, although no negro was a party to the suit).

the father stand in place of the child. This Court has often recognized the standing of a litigant to prosecute the rights of another if the litigant demonstrates: [1] a degree of injury to himself, and [2] that, under the circumstances present, the injured parties whose rights they seek to litigate would probably be unable to assert their own rights. See e.g., *Barrows v. Jackson*, 346 U.S. 249 (1953); *Buchanan v. Warley*, 245 U.S. 60 (1917); *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62 (1976); *Craig v. Boren*, 429 U.S. 190, 192-197 (1976); *Carey v. Population Services Intl.*, 431 U.S. 678, 682-684 (1977); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). The policy underlying these requirements was best stated in *Singleton v. Wulff*, 428 U.S. 106 (1976). With respect to the first requirement *Singleton* states:

> If the enjoyment of the right is inextricably bound up with the activity the litigant wishes to pursue, the court at least can be sure that its construction of the right is not unnecessary in the sense that the right's enjoyment will be unaffected by the outcome of the suit. Furthermore, the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter. 428 U.S. at 114, 115.

Here Mr. Loce sought only to protect his child's life. It matters not that he was prosecuted under a general trespass statute: the

activity in which he engaged was that of preventing the death of his child. The day before he petitioned the Court to enjoin the termination of the child's life. The purpose and intent of his activity at the clinic on September 8, 1990 cannot be mistaken. For its part, the State of New Jersey made it clear that the conviction by the State was in furtherance of a "constitutionally protected abortion" guaranteed by *Roe* and *Casey* [A-86-88]. The harm to Mr. Loce could not be more apparent: he [1] was criminally prosecuted for asserting the rights of his child; [2] lost the enjoyment of the relationship with his child [99]; and [3] the child's life, in which he enjoyed an interest, was irreparably lost by his arrest.[100]

[99] In addition to his prosecution, the harm to Mr. Loce is directly related to his child's rights. A father has a profound interest in his child's welfare. Whether or not they are directly and substantively implicated, the father's Constitutional rights to [1] companionship and association (e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Santosky v. Kraemer*, 455 U.S. 745 (1982) "...the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"); [2] equal protection, (e.g. *Craig v. Boren*, 429 U.S. 190 (1976); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Califano v. Webster*, 430 U.S. 313 (1977); [3] procreate (e.g., *Skinner v. Oklahoma*, 316 U.S. 535 (1942); [4] discharge his obligation to his children (e.g. *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925)); and [5] defend life (e.g., *Art. 1, §1, N.J. Const. 1947*; Due Process Clause, Fourteenth Amendment U.S. Const.), surely form the foundation to distinguish his relationship with the child as unique and sufficient to create in him standing to speak for his child. *Griswold, supra*.

[100] A father's conviction and loss of his child's life (and the destruction of his own rights to defend his child, maintain a relationship with his child, procreate, equal protection, and to discharge his duties to his child) is a harm to him of a greater magnitude than loss of money (e.g. *Singleton v. Wulff, supra*.); subjection to money damages (*Barrows v. Jackson, supra*.); expulsion from a private club

The second requirement of *Singleton* is satisfied as in no other circumstance. Unlike every other instance, if standing is not recognized by someone other than the individuals whose rights the petitioner seeks to raise (those of the child prior to birth) then the rights of those individuals could never be prosecuted or protected. The conviction of Mr. Loce is an unconstitutional deprivation of his child's rights because the right would otherwise go entirely unprotected. However, only a mere showing that the rights of the parties would be adversely affected, not entirely denied, is sufficient for an acquittal. The harm to Mr. Loce (conviction and loss of his child's life and their relationship) and the total denial of his child's rights are more destructive to him and his child's rights than that found in any other case reported by this Court. In *Singleton, supra*, a doctor was *merely threatened* with the loss of money only, and the persons whose rights he sought to protect were capable of litigating their own rights. The mere "chilling" of the women's

(*Sullivan v. Little Hunting Park, supra.*); compulsion to convey property (*Buchanan v. Warley, supra.*); or potential exposure to criminal charges for conduct voluntarily engaged in to earn money (*Doe v. Bolton*, 410 U.S. 179, 188-189 (1973)). If this Court recognizes the standing of doctors who assist in terminating the life of children, then clearly the Court, by the same principles of law, must recognize the standing of a father who seeks to save his child's life.

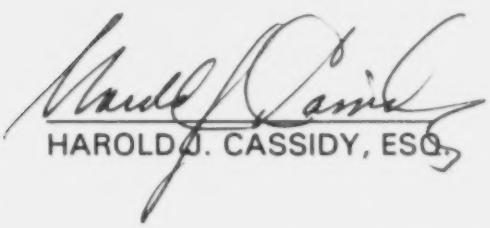
ability to assert their right was sufficient infringement of it to condemn the State's action. In *Doe v. Bolton*, 440 U.S. 179 (1973) a Georgia statute which *merely threatened* prosecution of a doctor was declared by the Court to be an unconstitutional infringement of a "patient's" rights despite the fact that [1] the doctor was not himself prosecuted, and [2] pregnant women were themselves parties in the same action. The combination of the mere threat of prosecution to the doctor combined with mere "restriction" of the women's rights rendered the statute against the doctor unconstitutional.[101] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the prosecution of the Executive Director and Medical Director of a clinic was declared to be an unconstitutional deprivation of the privacy rights of couples. This Court, in short, has held that if a state's interest, intrudes upon or violates an individual fundamental right, it cannot form the basis of a criminal

[101] Refusal to recognize the father's standing to raise his child's rights would constitute a violation of the Equal Protection Clause of the Fourteenth Amendment. New Jersey extends the defense of a defendant's act as being necessary to defend the life of others in every other instance, and the conviction of Mr. Loce is solely based upon the classification of persons only on their status as "unborn". See affirmative defenses for protecting other persons under *N.J.S.A.* 2C:3-5; *N.J.S.A.* 2C:32-2; *N.J.S.A.* 2C:3-10; *N.J.S.A.* 2C:30-8; and *New Jersey State Constitution Article 1, Section.1* (right to defend life). See *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964).

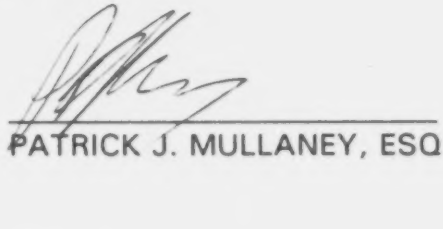
prosecution. The Appellate Division held that the constitutional right extended Ms. Z to terminate the child's life was the basis of Mr. Loce's conviction, and the interest the state sought to advance. The father in this case raised the child's rights in both a civil suit on September 7, 1990, and in this case where the state acted to protect the mother's "interest" to take the life of her own child. The removal of Mr. Loce from the clinic, his arrest and prosecution, all designed to further the goal of terminating the child's life is a profound unconstitutional deprivation of the child's natural and inalienable rights, and those codified by the Due Process and Equal Protection Clauses.

CONCLUSION

The issues presented by this case have never been decided by this Court and are of such public importance that the court must grant the writ of certiorari and decide them.



HAROLD J. CASSIDY, ESQ.



PATRICK J. MULLANEY, ESQ.

APPENDIX A

LIST OF ONE HUNDRED AND SEVENTY-FOUR CASES WHICH THE U.S. SUPREME COURT OVERRULED PRIOR DECISIONS

1. *Hudson v. Guestier*, 6 Cr. (10 U.S. 281, 285 (1810) (overruling *Rose v. Himley*, 4 Cr. (8 U.S.) 241 (1808)).

2. *Gordon v. Ogden*, 3 Pet. (28 U.S.) 33, 34 (1830) (overruling *Wilson v. Daniel*, 3 Dall. (3 U.S.) 401 (1798)).

3. *Greene v. Lessee of Neal*, 6 Pet. (31 U.S.) 291 (1832) (overruling *Patton v. Easton*, 1 Wheat. (14 U.S.) 476 (1816); *Powell's Lessee v. Harmon*, 2 Pet. (27 U.S.) 241 (1829)).

4. *Louisville Railroad Co. v. Letson*, 2 How. (43 U.S.) 497, 554-556 (1844) (overruling *Commercial and Railroad Bank v. Slocomb*, 14 Pet. (39 U.S.) 60 (1840) and *Strawbridge v. Curtiss*, 3 Cr. (7 U.S.) 267 (1806); *Qualifying Bank of the United States v. Deveaux*, 5 Cr. (9 U.S.) 61 (1809)).

5. *The Genessee Chief*, 12 How. (53 U.S.) 443, 456 (1851) (overruling *The Thomas Jefferson*, 10 Wheat. (23 U.S.) 428 (1825); *The Orleans v. Phoebus*, 11 Pet. (36 U.S.) 175 (1837)).

6. *Gazzam v. Phillip's Lessee*, 20 How. (61 U.S.) 372, 377-378 (1858) (overruling *Brown's Lessee v. Clements*, 3 How. (44 U.S.) 650 (1845)).

7. *Suydam v. Williamson*, 24 How. (65 U.S.) 427 (1861) (overruling *Williamson v. Berry*, 8 How. (49 U.S.) 495 (1850); *Williamson v. Irish Presbyterian Congregation*, 8 How. (49 U.S.) 565 (1850); *Williamson v. Ball*, 8 How. (49 U.S.) 566 (1850)).

8. *Mason v. Eldred*, 6 Wall. (73 U.S.) 231, 238 (1868) (overruling *Sheehy v. Mandeville*, 6 Cr. (10 U.S.) 253 (1810)).

9. *The Belfast*, 7 Wall. (74 U.S.) 624, 641 (1869) (overruling *Allen v. Newberry*, 21 How. (62 U.S.) 244 (1858) (in part)).

10. *Knox v. Lee* (The Legal Tender Cases), 12 Wall. (79 U.S.) 457, 553 (1871) (overruling *Hepburn v. Griswold*, 8 Wall. (75 U.S.) 603 (1870)).

11. *Trebilcock v. Wilson*, 12 Wall. (79 U.S.) 687 (1871) (overruling *Roosevelt v. Meyer*, 1 Wall (68 U.S.) 512 (1863)).

12. *Hornbuckle v. Toombs*, 18 Wall. (85 U.S.) 648, 652-653 (1874) (overruling *Noonan v. Lee*, 2 Bl. (67 U.S.) 499 (1863); *Orchard v. Hughes*, 1 Wall. (68 U.S.) 73, 77 (1864); *Dunphy v. Kleinsmith*, 11 Wall. (78 U.S.) 610 (1871)).

13. *Union Pac. R. Co. v. McShane*, 22 Wall. (89 U.S.) 444 (1874) (overruling *Kansas Pac. R. Co. v. Prescott*, 16 Wall. (83 U.S.) 603 (1873) (in part)).

14. *County of Cass v. Johnston*, 95 U.S. 360 (1877) (overruling *Harshman v. Bates County*, 92 U.S. 569 (1875)).

15. *Fairfield v. County of Gallatin*, 100 U.S. 47 (1879) (overruling *Town of Concord v. Savings-Bank*, 92 U.S. 625 (1875)).

16. *Tilghman v. Proctor*, 102 U.S. 707 (1880) (overruling *Mitchell v. Tilghman*, 19 Wall. (86 U.S.) 287 (1873)).

17. *Kilbourn v. Thompson*, 103 U.S. 168, 192-200 (1881) (overruling *Anderson v. Dunn*, 6 Wheat. (19 U.S.) 204 (1821)).

18. *United States v. Phelps*, 107 U.S. 320, 323 (1883) (overruling *Shelton v. The Collector*, 5 Wall. (72 U.S.) 113, 118 (1867)).

19. *Kountze v. Omaha Hotel Co.*, 107 U.S. 378, 387 (1883) (overruling *Stafford v. The Union Bank of Louisiana*, 16 How. (57 U.S.) 135 (1853)).

20. *Morgan v. United States*, 113 U.S. 476, 496 (1885) (overruling *Texas v. White*, 7 Wall. (74 U.S.) 700 (1869).

21. *Wabash, S.L. & P. Ry. Co. v. Illinois*, 118 U.S. 557 (1886) (overruling *Peik v. Chicago & N.W. Ry. Co.*, 94 U.S. 164 (1877) ("substantially though not expressly overruled")).

22. *Phila. Steamship Co. v. Pennsylvania*, 122 U.S. 326 (1887) (overruling *State Tax on Railway Gross Receipts*, 15 Wall. (82 U.S.) 284 (1873) ("basic grounds of decision repudiated")).

23. *In re Ayers*, 123 U.S. 443 (1887) (overruling *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738 (1824)).

24. *Leloup v. Port of Mobile*, 127 U.S. 640, 647 (1888) (overruling *Osborne v. Mobile*, 16 Wall. (83 U.S.) 479 (1873)).

25. *Leisy v. Hardin*, 135 U.S. 100, 118 (1890) (overruling *Peirce v. New Hampshire*, 5 How. (46 U.S.) 504 (1847)).

26. *Brenham v. German-American Bank*, 144 U.S. 173, 187 (1892) (overruling *Rogers v. Burlington*, 3 Wall. (10 U.S.) 654 (1866); *Mitchell v. Burlington*, 4 Wall. (71 U.S.) 270 (1867)).

27. *Roberts v. Lewis*, 153 U.S. 367, 377 (1894) (overruling *Giles v. Little*, 104 U.S. 291 (1881)).

28. *Pollock v. Farmer's Loan & Trust Co.*, 158 U.S. 601 (1895) (overruling *Hylton v. United States*, 3 Dall. (3 U.S.) 171 (1796)).

29. *Garland v. Washington*, 232 U.S. 642, 646 (1914) (overruling *Crain v. United States*, 162 U.S. 625 (1896)).

30. *United States v. Nice*, 241 U.S. 591, 601 (1916) (overruling *In re of Heff*, 197 U.S. 488 (1905)).

31. *Pennsylvania R.R. Co. v. Towers*, 245 U.S. 6, 17 (1917) (overruling *Lake Shore & M.S. Ry. Co. v. Smith*, 173 U.S. 684 (1899) (in part)).

32. *Rosen v. United States*, 245 U.S. 467, 470 (1918) (overruling *United States v. Reid*, 12 How. (53 U.S.) 361 (1851)).

33. *Boston Store v. American Graphophone Co.*, 246 U.S. 8, 25 (1918); *Motion Picture Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917) (overruling *Henry v. Dick Co.*, 224 U.S. 1 (1912)).

34. *Terrell v. Burke Constr. Co.*, 257 U.S. 529, 533 (1922) (overruling *Doyle v. Continental Ins. Co.*, 94 U.S. 535 (1877); *Security Mutual Life Ins. Co. v. Prewitt*, 202 U.S. 246 (1906)).

35. *Lee v. Chesapeake & Ohio Ry.*, 260 U.S. 653, 659 (1923) (overruling *Ex parte Wisner*, 203 U.S. 449 (1906); qualifying; *In re Moore*, 209 U.S. 490 (1908)).

36. *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203, 218 (1925) (overruling *Baltic Mining Co. v. Massachusetts*, 231 U.S. 68 (1913)).

37. *Ches. & Ohio Ry. Co. v. Leitch*, 276 U.S. 429 (1928) (rehearing) (overruling *Chesapeake and Ohio Ry. Co. v. Leitch*, 275 U.S. 507 (1927) (not recorded)).

38. *Gleason v. Seaboard Ry.*, 278 U.S. 349, 357 (1929) (overruling *Friedlander v. Texas & Railway Co.*, 130 U.S. 416 (1889) (in part)).

39. *Farmers Loan Co. v. Minnesota*, 280 U.S. 204, 209 (1930) (overruling *Blackstone v. Miller*, 188 U.S. 189 (1903)).

40. *East Ohio Gas Co. v. Tax Comm.*, 283 U.S. 465, 472 (1931) (overruling *Penna. Gas Co. v. Pub. Service Comm.*, 292 U.S. 23 (1920)).

41. *Chicago & E.I.R. Co. v. Commission*, 284 U.S. 296 (1932) (overruling *Erie R.R. Co. v. Collins*, 253 U.S. 77 (1920); *Erie R.R. Co. v. Szary*, 253 U.S. 86 (1920)).

42. *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932) (overruling *Long v. Rockwood*, 277 U.S. 142 (1928)).

43. *New York ex rel. Northern Finance Corp. v. Lynch*, 290 U.S. 601 (1933) (overruling *Macallen Co. v. Massachusetss*, 279 U.S. 620 (1929). *See also United States v. City of Detroit*, 355 U.S. 466, 472 n. 2 (1958)).

44. *Funk v. United States*, 290 U.S. 371, 373, 386 (1933) (overruling *Stein v. Bowman*, 13 Pet. (38 U.S.) 209 (1839) (in part); *Hendrix v. United States*, 219 U.S. 79 (1911); *Logan v. United States*, 144 U.S. 263 (1892); *Jim Fuey Moy v. United States*, 254 U.S. 189 (1920)).

45. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (overruling *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Morehead v. N.Y. ex rel. Tipaldo*, 298 U.S. 587 (1936)).

46. *R.R. Comm. v. Pacific Gas Co.*, 302 U.S. 388 (1938) (rehearing) (overruling *Railroad Commission v. Pacific Gas Co.*, 301 U.S. 669 (1937) (not recorded)).

47. *Helvering v. Producers Corp.*, 303 U.S. 376 (1938) (overruling *Gillespie v. Oklahoma*, 257 U.S. 501 (1922); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)).

48. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 69, 79 (1938) (overruling *Swift v. Tyson*, 16 Pet. (41 U.S.) 1 (1842)).

49. *Graves v. N.Y. ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Dobbins v. Erie County*, 16 Pet. (41 U.S.) 435 (1842); *Collector v. Day*, 11 Wall. (78 U.S.) 113 (1871); N.Y. ex rel. *Rogers v. Graves*, 299 U.S. 401 (1937); *Brush v. Commissioners*, 300 U.S. 352 (1937)).

50. *Rochester Tel. Corp. v. United States*, 307 U.S. 125 (1939) (overruling *Proctor & Gamble v. United States*, 225 U.S. 282 (1912)).

51. *O'Malley v. Woodrough*, 307 U.S. 277 (1939) (overruling *Evans v. Gore*, 253 U.S. 245 (1920)).

52. *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935)).

53. *Helvering v. Hallock*, 309 U.S. 106 (1940) (overruling *Helvering v. St. Louis Trust Co.*, 296 U.S. 39 (1935); *Becker v. St. Louis Trust Co.*, 296 U.S. 48 (1935)).

54. *Tigner v. Texas*, 310 U.S. 141 (1940) (overruling *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540 (1902)).

55. *United States v. Darby*, 312 U.S. 100 (1941) (overruling *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (limited)).

56. *United States v. Chicago, M.St. P. & P.R. Co.*, 312 U.S. 592 (1941) (overruling *United States v. Lynch*, 188 U.S. 445 (1903) (in part); *United States v. Heyward*, 250 U.S. 633 (1919) (not recorded)).

57. *Nye v. United States*, 313 U.S. 33 (1941) (overruling *Toldeo Newspaper Co. v. United States*, 247 U.S. 401 (1918)).

58. *California v. Thompson*, 313 U.S 109 (1941) (overruling *Di Santo v. Pennsylvania*, 273 U.S. 34 (1927)).

59. *United States v. Classic*, 313 U.S 299 (1941) (overruling *Newberry v. United States*, 256 U.S. 232 (1921)).

60. *Olsen v. Nebraska*, 313 U.S. 236 (1941) (overruling *Ribnik v. McBride*, 277 U.S. 250 (1928)).

61. *Alabama v. King & Boozer*, 314 U.S. 1 (1941) (overruling *Panhandle Oil Co. v. Knox*, 277 U.S. 219 (1928); *Graves v. Texas Company*, 298 U.S. 393 (1936)).

62. *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118 (1941) (overruling *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921)).

63. *Edwards v. California*, 314 U.S. 160 (1941) (overruling *City of New York v. Miln*, 11 Pet. (36 U.S.) 103 (1837)).

64. *State Tax Comm. v. Aldrich*, 316 U.S. 174 (1942) (overruling *First National Bank v. Maine*, 284 U.S. 312 (1932)).

65. *Williams v. North Carolina*, 318 U.S. 287 (1942) (overruling *Haddock v. Haddock*, 201 U.S. 562 (1906)).

66. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943) (overruling *Johnson v. Fleet Corporation*, 280 U.S. 320 (1930)).

67. *Jones v. Opelika*, 319 U.S. 103 (1943) (re-argument); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (overruling *Jones v. Opelika*, 316 U.S. 584 (1942)).

68. *Oklahoma Tax Comm. v. United States*, 319 U.S. 598 (1943) (overruling *Childers v. Beaver*, 270 U.S. 555 (1926)).

69. *Board of Education v. Barnette*, 319 U.S. 624 (1943) (overruling *Minersville District v. Gobitis*, 310 U.S. 586 (1940)).

70. *FPC v. Hope Gas Co.*, 320 U.S. 591 (1944) (overruling *United Railways v. West*, 280 U.S. 234 (1930 (in part)).

71. *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944) (overruling *Leeds & Catlin Co. v. Victor Talk. Mach. (no. 2)*, 213 U.S. 325 (1909) (limited)).

72. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944) (overruling *Plamals v. Pinar Del Rio*, 277 U.S. 151 (1928) (in part)).

73. *Smith v. Allwright*, 321 U.S. 649 (1944) (overruling *Grovey v. Townsend*, 295 U.S. 45 (1935)).

74. *United States v. Southeastern Underwriters' Assn.*, 322 U.S. 533 (1944) (overruling *Paul v. Virginia*, 8 Wall. (75 U.S.) 168 (1869); *United States v. Schwimmer*, 279 U.S. 644 (1929)).

75. *Girouard v. United States*, 328 U.S. 61 (1946) (overruling *United States v. MacIntosh*, 283 U.S. 605 (1931); *United Stats v. Bland*, 283 U.S. 636 (1931)).

76. *Halliburton Co. v. Walker*, 3298 U.S. 1 (1946) (rehearing) (overruling *Halliburton Co. v. Walker*, 326 U.S. 696 (1946)).

77. *MacGregor v. Westinghouse Co.*, 329 U.S. 402 (1947) (rehearing) (overruling *MacGregor v. Westinghouse Co.*, 327 U.S. 758 (1946)).

78. *Angel v. Buelington*, 330 U.S. 183 (1947) (overruling *David Lupton's Sons v. Auto. Club of Am.*, 225 U.S. 489 (1912) (rendered obsolete by prior change in law)).

79. *Zap v. United States*, 330 U.S. 800 (1947) (rehearing) (overruling *Zap v. United States*, 328 U.S. 624 (1946)).

80. *Thibaut v. Car and General Ins. Corp.*, 332 U.S. 828 (1947) (on rehearing) (overruling *Thibaut v. Car and General Ins. Corp.*, 332 U.S 751 (1947)).

81. *Sherrer v. Sherrer*, 334 U.S. 343 (1948) (overruling *Andrews v. Andrews*, 188 U.S. 14 (1908) (in part)).

82. *Lincoln Federal Labor Union v. Northwestern*, 335 U.S. 525 (1949) (overruling *Adair v. United States*, 208 U.S. 161 (1908)) *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941) (overruling *Coppage v. Kansas*, 236 U.S. 1 (1915)).

83. *Comr. v. Estate of Church*, 335 U.S. 632, 637 (1949) (overruling *May v. Heiner*, 281 U.S. 238 (1930)).

84. *Ott v. Mississippi Barge Line*, 336 U.S. 169 (1949) (overruling *St. Louis v. Ferry Company*, 11 Wall. (78 U.S.) 423 (1870); *Old Dominian Steamship Co. v. Virginia*, 198 U.S. 299 (1905); *Ayer & Lord Co. v. Kentucky*, 202 U.S. 409 (1906)).

85. *Oklahoma Tax Comm. v. Texas Co.*, 336 U.S. 342 (1949) (overruling *Choctaw & Gulf R.R. v. Harrison*, 235 U.S. 292 (1914); *Indian Oil Co. v. Oklahoma*, 240 U.S. 522 (1916); *Howard v. Gipsy Oil Co.*, 247 U.S. 503 (1918); *Large Oil Co. v Howard*, 248 U.S. 549 (1919); *Oklahoma v. Barnsdall Corp.*, 296 U.S. 521 (1936)).

86. *Cosmopolitan Co. v. McAllister*, 336 U.S. 783 (1949) (overruling *Hust v. Moore-McCormack Lines*, 328 U.S. 707 (1946)).

87. *United States v. Rabinowitz*, 339 U.S. 56, 66, 85 (1950) (overruling *Trupiano v. United States*, 334 U.S. 699 (1948); *McDonald v. United States*, 335 U.S. 451 1948)).

88. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502 (1952) (overruling *Mutual Film Corp. v. Ohio Indus'l Comm.*, 236 U.S. 230 (1915)).

89. *Brown v. Board of Education*, 347 U.S. 483, 491, 494-495 (1954) (overruling *Cumming v. Board of Education*, 175 U.S. 528 (1899); *Gong Lum v. Rice*, 275 U.S. 78 (1927)).

90. *In re Disbarment of Isserman*, 348 U.S. 1 (1954) (on rehearing) (overruling *In re Isserman*, 345 U.S. 286 (1953)).

91. *Gayle v. Browder*, 352 U.S. 903 (1956) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

92. *Reid v. Covert*, 354 U.S. 1 (1957) (overruling *Kinsella v. Krueger*, 351 U.S. 470 (1956); *Reid v. Covert*, 351 U.S. 487 (1956)).

93. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 419 (1957) (overruling *Thompson v. Thompson*, 226 U.S. 551 (1913)). *See also Armstrong v. Armstrong*, 350 U.S. 568, 581 (1956)).

94. *Ladner v. United States*, 358 &U.S. 169 (1958) (rehearing) (overruling *Ladner v. United States*, 355 U.S. 282 (1958)).

95. *United States v. Raines*, 362 U.S. 17, 27 (1960) (overruling *United States v. Reese*, 92 U.S. 214, 220-221 (1876)).

96. *Elkins v. United States*, 364 U.S. 206, 210, 212-213, 283 (1960); *Rios v. United States*, 364 U.S. 253 (1960) (overruling *Weeks v. United States*, 282 U.S. 386, 398 (1914) (in part); *Center v. United States*, 267 U.S. 575 (1925); *Byars v. United States*, 273 U.S. 28, 33 (1927) (in part); *Feldman v. United States*, 322 U.S. 487, 492 (1944) (in part)).

97. *James v. United States*, 366 U.S. 213, 215, 221, 223, 241 (1961) (overruling *CIR v. Wilcox*, 327 U.S. 404 (1946)).

98. *Mapp v. Ohio*, 367 U.S. 643, 653-655 (1961) (overruling *Wolf v. Colorado*, 338 U.S. 25 (1949) (in part)); *See also Ker v. California*, 374 U.S. 23, 45, 53, 59 (1963) (overruling *Irving v. California*, 347 U.S. 128 (1954) (in part)).

99. *Baker v. Carr*, 369 U.S. 186, 277, 280 (1962) (overruling *Colegrove v. Green*, 328 U.S. 549 (1946) (in part)).

100. *Wesberry v. Sanders*, 376 U.S. 1 (1964) (overruling *Colegrove v. Barrett*, 330 U.S. 804 (1947)).

101. *Smith v. Evening News Assn.*, 371 U.S. 195, 199 (1962) (overruling *Westinghouse Employees v. Westinghouse Corp.*, 348 U.S. 437 (1955) (in part)). *See also Truck Drivers Union v. Riss & Co.*, 372 U.S. 517, 520 (1963).

102. *Construction Laborers v. Curry*, 371 U.S. 542, 552, 554 (1963) (overruling *Building Union v. Ledbetter Co.*, 344 U.S. 178 (1952) (in part)).

103. *Gideon v. Wainwright*, 372 U.S. 335, (1963) (overruling *Betts v. Brady*, 316 U.S. 455 (1942)).

104. *Gray v. Sanders*, 372 U.S. 368, 383 (1963) (overruling *Cook v. Fortson, Turman v. Duckworth*, 329, U.S. 675 (1946); *South v. Peters*, 339 U.S. 276 (1950); *Cox v. Peters*, 342 U.S. 936 (1952); *Hartsfeld v. Sloan*, 357 U.S. 916 (1958)).

105. *Fay v. Noia*, 372 U.S. 391, 435 (1963) (overruling *Darr v. Burford*, 339 U.S. 200 (1950) (in part)).

106. *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (overruling *Adams v. Tanner*, 244 U.S. 590 (1917)).

107. *Schneider v. Rusk*, 377 U.S. 163 (1964) (overruling *Mackenzie v. Hare*, 239 U.S. 299 (1915)).

108. *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (overruling *Twining v. New Jersey*, 311 U.S. 78 (1908); *Adamson v. California*, 332, U.S. 46 (1947)).

109. *Murphy v. Waterfront Comm.*, 378 U.S. 52, 57, 77 (1964) (overruling *Jack v. Kansas*, 199 U.S. 372 (1905); *United States v. Murdock*, 284 U.S. 141 (1931); *Feldman v. United States*, 322 U.S. 487 (1944); *Knapp v. Schweitzer*, 357 U.S. 371 (1958); *Mills v. Louisiana*, 360 U.S. 230 (1959)).

110. *Jackson v. Denno*, 378 U.S. 368, 391 (1964) (overruling *Stein v. New York*, 346 U.S. 156 (1953)).

111. *Escobedo v. Illinois*, 378, U.S. 478, 491-492 (1964) (overruling *Crooker v. California*, 357 U.S. 433 (1958); *Cicenia v. LaGay*, 357 U.S. 504 (1958)).

112. *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (overruling *West v. Louisiana*, 194 U.S. 258 (1904)).

113. *Gold v. DiCarlo*, 380 U.S. 520 (1965) (overruling *Tyson & Bro. v. Banton*, 273 U.s. 418 (1927)).

114. *Swift & Co. v Wickham*, 382 U.S. 111 (1965) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153 (1962)).

115. *Harris v. United States*, 382 U.S. 162 (1965) (overruling *Brown v. United States*, 359 U.S. 41 (1959)).

116. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (overruling *Breedlov v. Suttles*, 302 U.S. 277 (1937); *Butler v. Thompson*, 341 U.S. 937 (1951)).

117. *Spevack v. Klein*, 385 U.S. 511 (1967) (overruling *Cohen v. Hurley*, 366 U.S. 177 (1961)).

118. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (overruling *Adler v. Board of Education*, 342 U.S. 485 (1952)).

119. *Afroyim v. Rusk*, 387 U.S. 253 (1967) (overruling *Perez v. Brownell*, 356 U.S. 44 (1958)).

120. *Warden v. Hayden*, 387 U.S. 294 (1967) (overruling *Gouled v. United States*, 255 U.S. 298 (1921)).

121. *Camara v. Municipal Court*, 387 U.S. 523 (1967) (overruling *Frank v. Maryland*, 359 U.S. 360 (1959)).

122. *Berger v. New York*, 388 U.S. 41 (1967) (overruling *Olmstead v. United States*, 277 U.S. 437 (1928) (in part)).

123. *Katz v. United States*, 389 U.S. 347 (1967) (overruling *Olmstead v. United States*, 277 U.S. 438 (1928)).

124. *Peyton v. Rowe*, 391 U.S. 54 (1968) (overruling *McNally v. Hill*, 293 U.S. 131 (1934)).

125. *Bruton v. United States*, 391 U.S. 123 (1968) (overruling *Delli Paoli v. United States*, 352 U.S. 232 (1957)).

126. *Duncan v. Louisiana*, 391 U.S. 145 (1968) (overruling *Maxwell v. Dow*, 176 U.S. 581 (1900)).

127. *Carafax v. LaVallee*, 391 U.S. 234 (1968) (overruling *Parker v. Ellis*, 362 U.S. 574 (1960)).

128. *Lee v. Florida*, 392 U.S. 378 (1968) (overruling *Schwartz v. Texas*, 344 U.s. 199 (1952)).

129. *Jones v. Alfred H. Mayer Co.*, 382 U.S. 409, 441-443 (1968) (overruling *Hodges v. United States*, 203 U.S. 1 (1906)).

130. *Moore v. Ogilvie*, 394 U.S. 814 (1969) (overruling *MacDougall v. Green*, 335 U.S. 281 (1948)).

131. *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (overruling *Whitney v. California*, 274 U.S. 357 (1927)).

132. *Chimel v. California*, 395 (U.S. 752 (1969) (overruling *Harris v. United States*, 331 U.S. 145 (1947); United *States v. Rabinowitz*, 339 U.S. 56 (1950)).

133. *Benton v. Maryland*, 395 U.S. 784 (1969) (overruling *Palko v. Connecticut*, 302 U.S. 319 (1967)).

134. *Ashe v. Swenson*, 397 U.S. 436 (1970) (overruling *Hoog v. New Jersey*, 356 U.S. 464 (1958)).

135. *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970) (overruling *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962)).

136. *Prince v. Georgia*, 398 U.S. 323, 329-330 (1970) (overruling *Brantley v. Georgia*, 217 U.S. 284 (1910)).

137. *Moragne v. States Marine Lines*, 398 U.S. 375 (1970) (overruling *The Harrisburg*, 119 U.S. 199 (1886)).

138. *Williams v. Florida*, 399 U.S. 78 (1970) (overruling in part *Thompson v. Utah*, (170 U.S.) 343 (1898), *Rassmussen v. United States*, 197 U.S. 516 (1905)).

139. *Blonder-Tongue Labs v. Univ. of Ill. Foundation*, 402 U.S. 313 (1971) (overruling *Triplett v. Lowell*, 297 U.S. 638 (1936)).

140. *Andrews v. L. & N.R. Co.*, 406 U.S. 320 (1972) (overruling *Moore v. Ill. Cent. R. Co.*, 312 U.S. 630 (1941)).

141. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (overruling in part *Fuentes v. Shevin*, 407 U.S. 67 (1972)).

142. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (overrulling *Northwestern Life Ins. Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Asssociation v. Greenberg*, 204 U.S. 359, 363; *See also Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925)).

143. *Perez v. Campbell*, 402 U.S. 637, 91 S.Ct. 1704, 29 L.Ed.2d 233 (1971) (overruling *Kesler v. Dept of Public Safety*, 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962)).

144. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972) (overruling *Pope v. Williams*, 193 U.S. 621, 24 S.Ct. 573, 48 L.Ed. 817 (1904)).

145. *Lehnkausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973) (overruling *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 48 S.Ct. 553, 72 L.Ed. 927 (1928)).

146. *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) (overruling *A book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1

(1966)).

147. *North Dakota Pharmacy Board v. Snyder's Drug Stores*, 414 U.S. 156, 94 S.Ct. 407, 38 L.Ed.2d 379 (1973) (overruling *Liggett Co. v. Baldridge*, 278 U.S. 105, 49 S.Ct. 57, 73, L.Ed. 204 (1929)).

148. *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (overruling *Shapiro v. Thompson*, 394 U.S. 6128, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969) (in part)).

149. *State Dept. of Health & Rehabilitative Services v. Zarate*, 407 U.S. 918, 92 S.Ct. 2462, 32 L.Ed.2d 803 (1972); and *Sterrett v. Mothers' & Children's Rights Organization*, 409 U.S. 809, 93 S.Ct. 68, 34 L.Ed.2d 70 (1972):

150. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.t. 692, 42 L.Ed.2d 690 (1975) (overruling *Hoyt v. Florida*, 368 U.S. 57, 82 S.Ct. 159, 7 L.Ed.21d 118 (1961) (in effect)).

151. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S.Ct. 535, 46 L.Ed.2d 495 (1976) (overruling *Low v. Austin*, 13 Wall. 29, 20 L.Ed. 517 (1872)).

152. *Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942)).

153. *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976) (overruling *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968)).

154. *New Orleans v.Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976) (overruling *Morey v. Doud*, 354 u.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485 (1957);

155. *Craig v. Boren*, 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (overruling *Goesaert v. Cleary*, 335 U.S. 464,

69 S.Ct. 197, 92 L.Ed. 163 (1948);

156. *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977) (overruling *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951);

157. *Schaeffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977) (overruling *Pennoyer v. Neff*, 95 U.S. 714, 24 L.Ed. 565 (1878)).

158. *Dept. of Revenue of Washington v. Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2ds 682 (1978) (overruling *Puget Sound Stevedoring Co. v. State Tax Commn.*, 302 U.S. 90, 58 S.Ct. 72, 82, L.Ed. 68 (1937)).

159. *United States v. Scott*, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358, 95 S. Ct. 1006, 43 L.Ed.2d 250 (1975)).

160. *Hughes v. Oklahoma*, 441 U.S. 322, 99 S.Ct. 1727, 60 L.Ed.2d 250 (1979) (overruling *Geer v. Connecticut*, 161 U.S. 519, 16 S.Ct. 600, 40 L.Ed.793 (1896)).

161. *United States v. Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980) (overruling *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960)).

162. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 101 S.Ct. 2946, 69 L.Ed.2d 884 (1981) (overruling *Heisler v. Thomas Colliery Co.*, 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237 (1922)).

163. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983) (overruling *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964)).

164. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (overruling *Rolston v. Missouri Fund Comm'rs.*, 120 U.S. 390, 7 S.Ct.

499, 30 L.Ed. 721 (1887) (in part)).

165. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 104 S.Ct. 1099, 79 L.Ed.2d 361 (1984) (overruling *Coffey v. United States*, 116 U.S. 436, 6 S.Ct. 437, 29 L.Ed. 684 (1886)).

166. *Garcia v. San Antonio Metro Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (overruling *National League of Cities v. Usery*, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976)).

167. *United States v. Miller*, 471 U.S. 130, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985) (overruling in part *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887)).

168. *Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (overruling *Parratt v. Taylor*, 451 U.S. 527, 1010 S.Ct. 1908, 68 L.Ed.2d 420 (1981) (in part)).

169. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1868) (overruling *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965) (in part)).

170. *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d364 (1987) (overruling *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969)).

171. *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 107 S.Ct. 2941, 97 L.Ed.2d 389 (1987) (overruling *Parden v. Terminal Railway of Alabama Docks Dept.*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964)(in part)).

172. *South Carolina v. Baker*, 485 U.S. 505, 108 S.Ct. 1355, 99 L.Ed.2d 592 (1988) (overruling *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 15 S.Ct. 673, 39 L.Ed. 759 (1895)).

173. *Thornburgh v. Abbott*, 490 U.S. 401, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) (overruling *Procunier v. Martinez*, 416

U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (in part)).

174. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791, 2823 (1992) (overruling *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S.; at 762, 106 S.Ct. at 2179 and Akron I, 462 U.S. 416, 103 S.Ct. 2481.

APPENDIX B

REPRESENTATIVE SCIENTIFIC AUTHORITIES WHICH CONCUR THAT LIFE BEGINS AT CONCEPTION

1. Audesirk, G.; and Audesink, T. *Biology: Life on Earth*. 2nd ed. New York: Macmillian Publishing Company, 1989.

   "A single lucky sperm may succeed in fertilizing it, starting the development of a new human being." p. 587

   "Fertilization occurs as the haploid nuclei of sperm and egg fuse, forming a diploid nucleus that contains all the genes of a new human being." p. 588

2. Nelson, G.E. *Biological Principles with Human Applications* 3rd ed. New York: John Wiley & Sons, 1989.

   "Since the parents differed genetically from each other, the zygote contains the genetic blueprint, so to speak, for a unique individual." p. 247

   "Whatever the number of genes, there are obviously enough to direct the formation of the whole human animal from a fertilized egg ... ." p. 288

   "An additional source of variation arises when a sperm and an egg unite. This recombination of a genetic materials adds to the pool of variation because no two eggs or sperm cells carry precisely the same genes. Therefore each recombination creates a unique individual." p. 288

3. Jennett, S. *Human Physiology*. New York: Churchill Livingstone, 1989.

   "The life of an individual begins at conception, the fertilization of an ovum by a spermatozoon." p. 409

4. Moore, K. *Before We Are Born* 3rd ed. Philadelphia: W.B. Saunders Company, 1989.

"Human development begins at fertilization when a male gamete or sperm fuses with a female gamete or ovum to form a zygote. The zygote is the first cell of a new human being." p. 25

"The male and female pronuclei fuse and the maternal and paternal chromosomes intermingle. The new diploid cell is called a zygote. It is the primordium of a human being." pp. 25-26

"Fusion of the two haploid gametes or germ cells (each with 23 chromosomes) produces a zygote, which is a diploid cell with 46 chromosomes, the normal number for the human species." p. 26

"Because half the chromosomes in the zygote come from the mother and the other half from the father, the zygote contains a new combination of chromosomes that differs from that of either of the parents. Consequently, fertilization forms the basis of biparental inheritance and ensures variation of the human species." p. 26

"The embryos chromosomal sex is determined at fertilization by the kind of sperm that fertilizes the ovum." p. 28

"Hence, it is the father rather than the mother whose gamete determines the sex of the embryo." p. 28

"Fertilization of the ovum by a sperm also initiates early human development by stimulating the zygote to undergo mitotic cell division or cleavage into two cells called blastomeres." p. 28

"Fertilization of the ovum usually occurs in the ampulla of the uterine tube. The process is complete when the haploid male and female pronuclei of the sperm and ovum, respectively, fuse to form a zygote. This diploid cell is the beginning of a new human being." p. 31

5. Thibodeau, G.A.; and Anthony, C.P. *Structure and Function of the Body* 8th ed. St. Louis: Times Mirror/Mosby College Publishers, 1988.

"The science of the development of the individual before birth is called embryology. It is a story of miracles, describing the means by which a new human life is started and the steps by which a single microscopic cell is transformed into a complex human being." pp. 409-410

"Genetically the zygote is complete. It represents a new single celled individual."

6. Thibodeau, G. *Anatomy and Physiology*. St. Louis: Times Mirror/Mosby College Publishing, 1987.

"Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother. Genetically, the zygote is complete. Time and nourishment are all that is needed for expression of those characteristics such as sex, body build, and skin color that were determined at fertilization." p. __

7. Scarr, S.; Weinberg, R.A.; and Levine A. *Understanding Development*. Harcourt Brace Jovanovich, Inc., 1986.

"The development of a new human being begins when a male's sperm pierces the cell membrane of a female's ovum, or egg." p. 86

"The villi become the placenta, which will nourish the developing infant for the next eight and a half months." p. 86

8. Craig, G. *Human Development* 4th ed. Englewood Cliffs, NJ: Prentice-Hall, 1986.

"Human development begins at the moment of conception." p. 57

"Here, we will look at the process of fertilization that marks the beginning of the life cycle of a human being." p. 57

9. Schuster, S.h.; and Asburn, S.S. *The Process of Human Development: A Holistic Life-Span Approach* 2nd ed. Boston: Little, Brown, and Company, 1986.

"Each individual begins life as a single cell that is formed by the union of two gametes - a sperm and an ovum (egg)." p. 50

"Characteristics are inherited according to specific laws, and the possibility of their occurrence in a new individual can be predicted." p. 58-59

10. Crouch, J.E. *Functional Human Anatomy* 4th ed. Philadelphia: Lea & Febiger, 1985.

"Development is a continuous process from conception (the fertilization of the ovum) to the death of the individual. For purposes of discussion, human development may be divided into two periods, prenatal development or embryology and postnatal development." p. 31

11. Gilbert, S.F. *Development Biology*. Sunderland, MA: Sinauer Associates, Inc., 1985.

"Fertilization is the process whereby two sex cells (gametes) fuse together to create a new individual with genetic potentials derived from both parents." p. 32

12. Clark, J. ed. *The Nervous System: Circuits of Communication In The Human Body*. Torstar Books, Inc., 1985.

"Each human begins life as a combination of two cells, a female ovum and a much smaller male sperm. This tiny unit, no bigger than a period on this page, contains all the

information needed to enable it to grow into the complex structure of the human body. The mother has only to provide nutrition and protection." p. 99

13. Clark, J.; ed. *Growth and Development: The Span of Life In The Human Body*. Torstar Books, Inc., 1985.

"... [T]here is absolutely no doubt at all that the story of the growth and development of a single being has its beginning at conception. This is the instant when a sperm from a human male enters and unites with an egg from a human female. The conceptual 'act of union' sets in motion a train of events of growth and development that only ends - perhaps more than a century later - when life itself ends." p. 9

"Fertilization brings together two sets of chromosomal material, one half the genetic blue print from the father, one half the genetic blueprint from the mother. Sperm and egg composition is so programmed that each sperm contains half the total gene complement of the father, each egg half that of the mother. This ensures that when egg and sperm fuse, a full complement of chromosomes exist in the newly fertilized egg. From this a new individual grows, ..." pp. 9-10

14. Clark, J.; ed. *Genetics and Heredity: The Blueprints of Life*, In *The Human Body*. Torstar Books, Inc., 1985.

"You are unique because the combination of your genes is unique, and nobody has exactly the same combination (even if you are an identical twin - although between such twins there are only subtle differences). Genes provide the fundamental information that determines how a person develops, although environmental acts to shape the final product form the moment of conception onward."

15. Turner, J.S.; and Helms, D.B. *Lifespan Developmental* 2nd ed. CBS College Publishing (Hold, Rinehart, and Winston), 1983.

"Yet far more remarkable than the birth itself is the process whereby a single fertilized egg develops into a fully functioning infant - complete with arms, legs, nose, eyes, ears, internal organs, and an individuality all of its own. The key to this magnificent story is a special code contained in the nucleus of a cell. This code, unique and different for every individual, is just now becoming understood by scientists." p. 52

"Each species of plant and animal and every individual within a species has a full set of directions locked inside its nucleus. This is what makes a mouse different from a bird, a flower different from a tree, and siblings different from each other." p. 52

"A zygote (a single fertilized egg cell) represents the onset of pregnancy and the genesis of a new life." p. 53

16. Volpe, E.P. *Biology and Human Concerns* 3rd ed. Dobuque, Iowa: Wm. C. Brown Company Publishers, 1983.

"Although the egg is many times greater in volume than the sperm, the two have equal potentialities as far as inheritance is concerned. The blueprints for traits are carried in the nucleus of each gamete (the mature sex cell - egg or sperm). The genetic characteristics of the future child are established at the time the sperm nucleus unites with the egg nucleus." p. 18

"The fertilized egg is genetically different from both parents, and one could contend that biological life commences at the moment of conception." p. 19

"The traits of an individual are largely determined by the genetic composition of the individual. A specific genetic code is locked into each cell of an individual of the very moment of the union of the sperm and egg nuclei." p. 20

17. Bernstein, R. and Bernstein, S. *Biology: The Study of Life*. New York: Harcourt Brace Jovanovick, Inc., 1982.

"The sets of genes carried by offspring produced by sexual reproduction differ from each other and from the sets carried by either parent." p. 544.

"Within 12 hours after sperm penetration the nuclei of the sperm and the egg fuse together, restoring the appropriate number of chromosomes for body cells. All of the genes that will determine the characteristics of the offspring are now present in a single nucleus, and the sex of the offspring is established." p. 584

18. Goldenring, J.M. *Development of the Fetal Brain*. 307 The New England Journal of Medicine 564(1982).

"I suggest that as physicians we should view human existence as a continuum from the first cell division of the fertilized ovum until the death of the last cell in the [human] organism." p. 564

19. Bryant, N.J. *Disputed Paternity*. New York: Brian C. Decker, a Division of Thieme-Stratton, Inc., 1980.

"The newly formed cell (which is known as a zygote) represents the beginning of life."

20. Mussen, P.H.; Conger, J.J.; and Kagan, J. *Child Development and Personality* 5th ed. New York: Harper & Row, 1979.

"The life of each individual begins when a sperm cell from the father penetrates the wall of an ovum, or egg, from the mother." p. 52

"Life begins at conception. But what of the forces that, throughout the individual's existence, will influence his or her development? When do they begin? The answer, again, is at conception. At the moment that the tiny tadpole-shaped sperm penetrates the wall of the ovum, it releases 23 minute particles called chromosomes. At approximately the same time, the nucleus, the inner core of the ovum, breaks up, releasing 23 chromosomes of its

own." pp. 52-53

"This process is of great interest to us because it has been established through painstaking research that these chromosomes, which are further subdivided into even smaller particles called genes, are the carriers of the child's heredity. All the child's biological heritage from the father and mother is contained in these 46 chromosomes." p. 53

21. Parker, S. *Life Before Birth: The Story of the First Nine Months*. Cambridge: Cambridge University press, 1979.

"The fertilized egg is smaller than a pinhead, but inside it, in the chromosomes, are all the instructions and information needed for a new human being to develop." p. 8

"The egg cell nucleus also releases its chromosomes, and both sets line up in the middle of the cell. This is the moment of fertilization, when a new life comes into being." p. 12 (emphasis added)

22. Harlock, E.B. *Child Development* 6th ed. McGraw-Hill, Inc., 1978.

"Life begins at the moment of conception - the time when a female reproductive cell, the ovum (plural, ova), is fertilized by a male reproductive cell, the spermatozoon (plural, spermatozoa)." p. 51

"The first important condition occurring at the time of conception, when the ovum is fertilized by the spermatozoon, is the determination of the newly created individual's hereditary endowment. When the sperm unites with the ovum, everything the newly conceived individual will ever inherit from parents, grandparents, and other more remote ancestors is set." p 53

"After conception, nothing can be done to add to, or subtract from, the individual's hereditary endowment." p 54

23. Strand, F.L. *Physiology: A Regulatory Systems Approach.* New York: Macmillan Publishing Company, Inc., 1978.
"The instant of fusion of the sperm nucleus with that of the ovum initiates a fascinatingly complex series of reactions which ultimately are designed to bring to full development an individual of the same species as the parents, bearing all the characteristics of his progenitors but individually different in a multitude of small ways. At this important instant, the genetic sex has also been determined." p. 542

"The cell has formed a new, mature individual, and we have come full cycle." p. 542

24. Fitzgerald, H.E.; Strommen, E.A.; and McKinney, J.P. *Developmental Psychology: The Infant and Young Child.* Homewood, IL: The Dorsey Press, 1977.

"In the normal human being, each cell is diploid, which means that it contains pairs of chromosomes - 23 pairs, or a total of 46 chromosomes." ... "Each parent contributes one half of the chromosomes complement to the new organism." p. 26

"During meiosis two phenomena occur which effectively guarantee that the new individual will be genetically unique. One of the phenomena, crossing-over, occurs when the chromosomes pair up. The other, segregation, occurs when the chromosomes begin to separate." p. 26

25. Pikunas, J. *Human Development: An Emergent Science.* McGraw-Hill, Inc., 1976.

"The union of ovum and sperm nuclei defines the hereditary endowment." p. 111

"The development of the child begins at conception, about nine months before birth." p. 111

26. Mader, S.S. *Inquiry into Life.* Dobuque, Iowa: Wm. C. Brown Company Publishers, 1976.

"Each gamete, you'll recall, contains the haploid number of chromosomes, and the fertilized egg, or zygote, contains the diploid number of chromosomes as the new individual now begins development." p. 433 (emphasis added)

27. Sussman, L.N. *Paternity Testing By Blood Grouping*. Springfield, IL: Charles C. Thomas Publisher, 1976.

"A complete cell called a zygote with its normal complement of twenty-three pairs of chromosomes is formed and a new somatic cell series - thus a new individual - begins."

28. Munsinger, H. *Fundamentals of Child Development* 2nd ed. New York: Holt, Rinehart, and Winston, Inc., 1975.
"Human life begins at Conception." p. 4

"Human life begins when one of many available sperm from a male succeeds in penetrating the wall of an ovum (egg) inside the female. The combination of material from the two parents, which determines what characteristics the new individual will inherit, begins a complicated sequence of development which will one day produce a mature human adult." p. 4

"Mendel assumed that a full set of genes comes from each parent as part of the fertilized egg (the zygote). This double set of genes is the genotype, the hereditary make up of the new individual." p. 42

29. Bernard, H.W. *Human Development in Western Culture* 4th ed. Boston: Allyn & Bacon, Inc., 1975.

"The life of a given individual begins when the sperm (male cell) penetrates the ovum (female cell)." p. 37

"Whatever biological potential is received from parents crosses this narrow hereditary bridge at the moment of conception." p. 40

30. Anthony C.P.; and Kolthoff, N.J. *Textbook of Anatomy and Physiology* 9th ed. St. Louis: the C.V. Mosby Company, 1975.

"The sperm head then forms itself into a nucleus that approaches and eventually fuses with the nucleus of the ovum, producing, at that moment, a new single-celled individual or zygote. Half of the 46 chromosomes in the zygote nucleus have come from the sperm and half from the ovum. Since chromosomes are composed of genes, the new being inherits half of its genes and the characteristics they determine from its father and half from its mother." p. 500

31. Goin, C.J.; and Goin, O.B. *Man and the Natural World* 2nd ed. New York: Macmillan Publishing Co., Inc., 1975.

"It is the resultant zygote that, by repeated mitotic cell divisions, will give rise to the adult of the next generation. This one of the most amazing facts of biology - that a single cell, by dividing and dividing and dividing again, can give rise to sometimes billions of cells of many different kinds and yet so precisely arranged that the resultant organism is not only a smoothly functioning individual but an individual of the same kind as the parent." p. 183

32. Lugo, J.O.; and Hershey, G.L. *Human Development: A Multi-Disciplinary Approach to the Psychology of Individual Growth*. New York: Macmillan Publishing Co., Inc., 1974.

"The growth of every human being begins with a special cell, the fertilized ovum. Although the diameter of the ovum is approximately 1/175 of an inch and its weight is about one 20-millionth of an ounce, all the genetic potentialities for the complete development of a human being are contained within it. From this microscopically small cell, a baby composed of about 200 billion cells of different kinds will develop during the next nine months. This striking phenomenon of growth is common in all human beings." p. 242

33. Kaluger, G.; and Kaluger, M. *Human Development: The Span of Life*. St. Louis: The C.V. Mosby Company, 1974.

"In that fraction of a second when the chromosomes form pairs, the sex of the new child will be determined, hereditary characteristics received from each parent will be set, and a new life will have begun." pp. 28-29

34. DeCoursey, R.M. *The Human Organism* 4th ed. McGraw-Hill, Inc., 1974.

"The zygote therefore contains a new arrangement of genes on the chromosomes never before duplicated in any other individual. The offspring destined to develop from the fertilized ovum will have a genetic constitution different from that of either parent and from anyone else in the world." p. 584

APPENDIX C

States Which Recognize That The Life Of A Human Being Begins At Conception

Alabama:

Trent v. State, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916) (interpreting state abortion law) ("'does not the new being, from the first day of its uterine life, acquire a legal and moral status that entitles it to the same protection as that guaranteed to human beings in extrauterine life?'") (quoting from the 1911 Transactions of the Medical Association of Alabama)

Wolfe v. Isbell, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (rejecting viability requirement in wrongful death action where death occurs after live birth):

> [T]he more recent authorities emphasize that there is no valid medical basis for a distinction based upon viability, especially where the child has been born alive. These [decisions] proceed on the premise that the fetus is just as much an independent being prior to viability as it is afterwards, and that from the moment of conception, the fetus or embryo is not a part of the mother, but rather has a separate existence within the body of the mother.

Eich v. Town of Gulf Shores, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974) (rejecting live birth requirement in wrongful death action) (stating that "the paramount purpose of our wrongful death statutes . . . is the preservation of human life" and holding that "it is illogical to allow liability to depend on whether death from fatal injury occurred before or after live birth")

Alabama Constitutional Convention Call (S.J. Res. 9, 1980 Ala. Acts 396):

> [A]pplies to the Congress . . . to call a convention for the sole and exclusive purpose of proposing an amendment to the Constitution that would protect

> the lives of all human beings including unborn children at every stage of their biological development and providing that neither the United States nor any state shall deprive any human being, from the moment of fertilization, of the right to life without due process of laws, nor shall any state deny any human being, from the moment of fertilization, the equal protection of the laws, except where pregnancy results from rape or incest; or where abortion is necessary to save the life of the mother; or where testing revealed abnormality or deformity of the fetus.

Arizona:

Nelson v. Planned Parenthood Center of Tucson, 19 Ariz. App. 142, 505 P.2d 580, 586 (1973) (construing state abortion law):

> One cannot gainsay a legislative determination that an embryonic or fetal organism is 'life.' Once begun, the inevitable result is a human being, barring prior termination of the pregnancy.

Ariz. Rev. State., sec. 13-1103(A)(5) (West 1989) (defining offense of manslaughter to include "[k]nowingly or recklessly causing the death of an unborn child at any stage of its development by any physical injury to the mother of such child which would be murder if the death of the mother had occurred")

Arkansas:

Ark. Const., Amend. 68, sec. 2 ("[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...")

Arkansas Constitutional Convention Call (Res. of Feb. 17, 1977, H.R.J. Res. 2):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilizaton to be a person and entitled to the right of life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

California:

Cal. Pen. Code, sec. 187(a) (West 1988) ("[m]urder is the unlawful killing of a human being, or a fetus, with malice aforethought")

Cal. Civ. Code, sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person, so far as may be necessary for its interests in the even of its subsequent birth")

Scott v. McPheeters, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939) (it is "an established and recognized fact by science and by everyone of understanding" that "an unborn child is a human being separate and distinct from its mother")

Connecticut:

Conn. Gen. Stat., Ann. sec. 53-31(a) (1985) ("[t]he public policy of the state and the intent of the legilatur is to protect and preserve human life from the moment of conception") (rep. by P.A. 90-113, sec. 4 (1990))

Simon v. Mullin, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977) (rejecting viability requirement in wrongful death action where death occurs after live birth) ("[t]he development of the principle of law that now permits recovery by or on behalf of a chil dborn alive for prenatal injuries suffered at any time after conception, without regard to the viability of the fetus, is a notable illustration of the viability of our common law")

Delaware:

Scott v. State, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955) (characterizing abortion law as one which defines an offense against the lives and persons of individuals)

Delaware Constitutional Convention Call (Res. of May 23, 1978), H.R. Con. Res. 9):

> Requests Congress to call a convention to propse a constitutional amendment that would protect the lives of all human beings, including unborn children at every stage of their biological development.

District of Columbia:

Bonbrest v. Kotz, 65 F. Supp. 138, 140 (D. D.C. 1946) (recognizing cause of action for prenatal injuries) ("[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Greater Southeast Community Hosp. v. Wiliams, 482 A.2d 394, 396 (D.C. Ct. App. 1984) (rejecting viability requiremetn in wrongful death action where death occurs after live birth) (referring to "established medical fact that a fetus is a person

separate from its mother")

Florida:

Day v. Nationwide Mut. Ins. Co., 328 So.2d 560, 561 (1976) (rejecting viability requirement in case of prenatal injuries) (quoting with approval Prosser, Handbood of the Law of Torts, Sec. 55 at 336 (4th ed. 1971)):

> Viability of course does not affect the question of the legal existence of the foetus, and therefore of the defendant's duty; and it is a most unsatisfactory criterion, since it is a relative matter, depending upon the health of the mother and child and many other matters in addition to the stage of development. Certainly, the infant may be no less injured; and all logic is in favor of ignoring the stage at which it occurs.[1]

Georgia:

Hornbuckle v. Plantation Pipe Line Co., 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956) (rejecting viability requirement in case of prenatal injuries) ("[i]f a child born after an injury sustained at any period of its prenatal life can prove the effect on it of a tort, it would have a right to recover") (one dissent characterized majority opinion as holding, in effect, "that an infant becomes a 'person' from the moment of conception, with the right to sue for a tortious injury after its birth"), id. at 506, 93 S.E.2d at 729.

[1] To which to the Fifth Edition of Prosser & Keaton (1984) adds: "With recent advances in embryology and medical technology, medical proof of causation in these cases has become increasingly reliable, which argues for eliminating the viability or other arbitrary developmental requirement altogether." Id. at 369.

Morrow v. Scott, 7 Ga. 535, 537 (1849) ("[i]n ... general, a child is to be considered as in being, from the time of its conception, where it will be for the benefit of such child to be so considered")

Gulf Life Ins. Co. v. Brown, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986) ("unquestionably, Georgia cases show a clear tendency toward placing a high premium on human life and an unmistakable willingness to recognize a fetus as a person at a time prior to actual delivery")

Idaho:

Nash v. Meyer, 54 Idaho 283, 301, 31 P.2d 273, 280 (1934) (construing state abortion law) (criminal abortion statute intended "to discourage abortions because thereby the life of a human being, the unborn child, is taken")

Blake v. Cruz, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part) ("[t]his Court recently committed itself to the proposition that an unborn child is a person in being," citing ~~Volk v. Baldazei~~, 103 Idaho 570, 651 P2d 11 (1982) (rejecting live birth requiremetn in wrongful death action where death occurs after viability))

Idaho Constitutional Convention Call (S. Con. Res. 132, 45th Legis. 2d Sess, 1980 Idaho Sess. Laws 1005):

> Request[]s that the Congress . . . call a constitutional convention for the specific and exclusive purpose of proposing an amendment . . . [to provide that]:
>
> (a) From the moment of conception a person shall be guaranteed all personal rights extended to all individuals under the constitution and laws of the United States of America and the state or states of residence and only under extreme circumstances shall it be otherwise, namesly to save the life of the mother, or other extenuating circumstances where at least two consulting physicians, one not having

> previously been involved in the case, and after due and thorough consultation with all persons having the legal right to be involved, find it is necessary and just that the life of the unborn shall be terminated.
>
> (b) Provide that the several states shall have the power to enforce such an amendment and establish priority of life by appropriate legislation.

Illinois:

Ill. Ann. Stat., ch. 38, par. 81-21 (Smith-Hurd 1977) (preamble to Illinois Abortion Act of 1975):

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the moment of conception and is, therefore, a legal person, for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State . . . .

Renslow v. Mennonite Hospital, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977) (rejecting viability requirement in cause of action for prenatal injuries)

Ill. Rev. Stat., ch. 70, par. 2.2 (1991) (amending wrongful death statute to allow wrongful death action to be brought on behalf of an unborn child without regard to the stage of pregnancy when the child is injured or whether there is a live birth)

Ill. Rev. Stat., ch. 38, par. 9-1.2(b)(1) (1991) (defining "unborn child" as "any individual of the human species from fertilization until birth")

Ill. Rev. Stat., ch. 38, pars. 9-1.2, 9-2.1, 9-3.2, 12-3.2, 12-4.4 (1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Indiana:

Cheaney v. State, 259 Ind. 138, 145, 285 N.E.2d 265, 268 (1972) (construing state abortion law) ("[i]t is now established that some sort of independent life begins at conception," rejecting quickening and viability as outdated and arbitrary distinctions)

Cowe v. Forum Group, Inc., 541 N.E.2d 962, 967-68 (Ind. App. 1989), rev'd and remanded on other grounds, 575 N.E.2d 630 (Ind. 1991) (recognizing cause of action for prenatal injuries at any time after conception and rejecting viability requirement)

Kentucky:

Ky. Rev. Stat. Ann., sec. 311.710(5) (Michie/Bobbs-Merrill 1990):

> If . . . the United States constitution is amended or relevant judicial decisions are reversed or modified, the declared policy of this Commonwealth to recognize and to protect the lives of all human beings regardless of their degree of biological development shall be fully restored.

Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations) (defining "fetus" as "a human being from fertilization until birth" and "human being" as "any member of the species homo sapiens from fertilization until death")

Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401):

> [R]equest[s] Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution . . . :
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency,

including their unborn offspring at every stage of their biological development.

Section 2. No unborn person shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Louisiana:

La. Stat. Ann., sec. 14.2(7) (West 1986) (defining "person" for purposes of criminal code to include "a human being from the moment of fertilization and implantation")

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring):

> This definition [La. Stat. Ann., sec. 14.2(7) (West 1986)] added to the Criminal Code in 1976, reflects a legislative intent to classify an unborn child as a "person" for purposes of violent criminal conduct like homicide and battery. The definition reveals an express recognition by the legislature that life begins at the moment of conception and that this form of life can indeed be the victim of a harm, i.e., a murder or battery.

Sec. 1 of Acts 1991, No. 26 (amending state abortion law):

> It is declared to be the public policy of the state of Louisiana that it has a legitimate compelling interest in protecting, to the greatest extent possible, the life of the unborn from the time of conception until birth. We also affirm our belief that life begins at conception and that life thereafter is a continuum until the time of death.

Johnson v. Southern New Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923) (rejecting live birth and viability requirements in cause of action for wrongful death) (quoted with approval in Danos v. St. Pierre, 402 So.2d 633, 639 (La. 1981)):

> The argument of the defendant is that the infant before it is born is not a child, not a human being, that it is only a thing, a part of the anatomy of the mother, as are her organs. We cannot accept that theory. We believe that the infant is a child from the moment of conception, although life may be in a state of suspended animation, the subject of love, affection and hope and that the injury or killing of it in its mother's womb is covered by the [wrongful death statute] and gives its bereaved parents to a right of action against the guilty parties for their grief and mental anguish.

Accord: *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951) (wrongful death of two to four month old unborn child).

Danos v. St. Pierre, 383 So.2d 1019, 1027 (La. App.), aff'd 402 So.2d 633 (La. 1991) (rejecting live birth requirement in action for wrongful death of a viable unborn child) (Lottinger, J., concurring):

> Viability has not been the controlling factor in some previous Louisiana cases allowing recovery [for wrongful death of a stillborn child], and there is no need to make it a controlling factor in this decision. Just as live birth is an arbitrary cut off point for wrongful death purposes, viability is equally arbitrary in deciding whether the fetus is a "person" whose wrongful killing is compensable.

Louisiana Constitutional Convention Call (Res. of July 16, 1976, S. Con Res. 70):

> Requests Congress to call a convention to propose

> a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; requests state legislative bodies to apply to Congress to call a convention to propose this constitutional amendment; grants Congress and the states the power to enforce the amendment.

Maine:

Smith v. State, 33 Me. 48, 57 (1851) (construing criminal abortion statue which abolished the quickening distinction):

> There is a removal of the unsubstantial distinction, that it is no offense to procure an abortion, before the mother becomes sensible of the motion of the child, notwithstanding it is then capable of inheriting an estate; and immediately afterwards is a great misdemeanor. It is now equally criminal to produce abortion before and after quickening. And the unsuccessful attempt to cause the destruction of an unborn child is a crime, whether the child be quick or not.

Maryland:

Damasiewicz v. Gorsuch, 197 Md. 417, 438, 79 A.2d 550, 559 (1951) (recognizing cause of action for prenatal injuries) ("from a medical point of view, a child is alive within the mother before the time arrives when it can live apart from her"), id. at 440, 79 A.2d at 560 (theory that "an unborn child is a part of the mother" is "an outworn point of view, now rejected by modern medicine")

Group Health Ass'n v. Blumenthal, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983) ("a cause of action lies for the wrongful death of a child born alive who dies as a result of injuries sustained

while en ventre sa mere") (rejecting viability requirement)

Massachusetts:

Commonwealth v. Cass, 392, Mass. 799, 801, 467 N.E. 2d 1324, 1325 (1984) (viable fetus is a "person" within meaning of vehicular homicide statute):

> In keeping with approved usage, and giving terms their ordinary meaning, the word "person" is synonymous with the term "human being." An offspring of human parents cannot reasonably be considered to be other than a human being, and therefore a person, first within, and then in the normal course outside, the womb . . . By the use of the term[] "person" . . . the Legislature has given no hint of a contemplated distinction between pre-born and born human beings.

Torigan v. Watertown News Co., Inc., 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967) (rejecting viability requirement in wrongful death action where death follows live birth)

Massachusetts Constitutional Convention Call (Act of June 8, 1977, H.R. 5984):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Michigan:

Womack v. Buchhorn, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971) (recognizing cause of action for prenatal injuries

and rejecting viability requirement because "a child has a legal right to begin life with a sound mind and body")

O'Neil v. Morse, 385 Mich. 130, 188 N.W.2d 785 (1971) (recognizing cause of action for wrongful death of a viable stillborn child)

Minnesota:

Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.) (amending criminal code to include a broad range of crimes, including homicide, that can be committed against an unborn child, regardless of gestational age)

Verkennes v. Corniea, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1940) (rejecting live birth requirement in wrongful death action) (quoting with approval federal district court opinion in *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946), where court said "[f]rom the viewpoint of the civil law, and the law of property, a child en ventre sa mere is not only regarded as [a] human being, but as such from the moment of conception--which it is in fact")

Missouri:

Mo. Ann. Stat. sec. 1.205.1(1) (Vernon Supp. 1992) (preamble to Missouri Abortion Law) ("[t]he life of each human being begins at conception")

Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992) (abortion regulations) (defining "unborn child" as "the offspring of human beings from the moment of conception until birth and at every stage of its biological development")

Rodgers v. Danforth, 486 S.W.2d 258, 259 (Mo. 1972) (construing criminal abortion law) (accepting stipulation that "unborn children have all the qualities and attributes of adult human persons differing only in age or maturity" and that "[m]edically, life is a continuum from conception to death")

Steggall v. Morris, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953) (rejecting viability requirement in cause of action for prenatal injuries)

Missouri Constitutional Convention Call (Res. of Apr. 24, 1975, S. Con. Res. 7):

> Requests Congress to call a convention to propose a constitutional amendment extending the term "person" in the Fifth and Fourteenth amendments to apply to all human beings "irrespective of age, health, function, or condition of dependency, including unborn offspring at every stage of their biological development;" permits states to adopt laws necessary to preserve the woman's life; grants Congress and the states the power to enforce the amendment.

Montana:

Mont. Code Ann., sec. 50-20-102 (1991) (statement of legislative purpose and intent--abortion regulations):

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we reaffirm the intent to extent the protection of the laws of Montana in favor of all human life.

Mont. Code Ann., sec. 41-1-103 (1991) ("[a] child conceived but not yet born is to be deemed an existing person, so far as may be necessary for its interests in the event of its subsequent birth")

Nebraska:

Neb. Rev. Stat. sec. 28-325 (1989) (legislative findings in statutes regulating abortion) (legislators "deplore the destruction of the unborn human lives which has and will occur . . . as a consequence of the United States Supreme Court's decision," and lament their inability "to protect the life, health, and welfare of

pregnant women and unborn human life")

Hans v. State, 147 Neb. 67, 72, 22 N.W.2d 385, 389 on rehearing, 147 Neb. 73, 25 N.W.2d 35 (1946) (statute defining offense of "foeticide" meant "the unlawful destruction of an unborn child, in ventre sa mere, at any stage of gestation")

Nebraska Constitutional Convention Call (Res. of Apr. 21, 1978, Legis. Res. 152):

> Legislature . . . petition[s] . . . Congress . . . to call a convention for the sole purpose of proposing the following article as an amendment to the Constitution of the United States . . .
>
> ARTICLE
>
> Section 1. With respect to the right to life, the word person as used in this article and in the Fifth and Fourteenth Articles of Amendment to this Constitution applies to all human beings irrespective of age, health, function, or condition of dependency, including their unborn offspring at every stage of their biological development.
>
> Section 2. No unborn child shall be deprived of life by any person, provided, however, that nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.
>
> Section 3. The Congress and the several states shall have the power to enforce this article by appropriate legislation.

Nevada:

White v. Yup, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969) (recognizing cause of action for prenatal injuries and for the wrongful death of a viable, stillborn child) (proposition that "[a]n unborn child is a part of its mother until birth and thus has no juridical existence" "has no scientific or medical basis in fact")

Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014):

> [L]egislature requests . . . Congress . . . to call a convention limited to proposing an amendment to the Constitution . . . to protect human life by restricting abortion [subject to exceptions in cases where the pregnancy results from rape or incest and where continuation of the pregnancy would seriously endanger the life of the mother].

New Hampshire:

Bennett v. Hymers, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958) (rejecting viability requirement in cause of action for prenatal injuries) ("[w]e adopt the opinion that the fetus from the time of conception become a separate organism and remains so throughout its life")

Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980) (wrongful death action) ("[t]o deny a nonviable fetus a [wrongful death] cause of action is not to deny that life begins with conception")

N.H. Rev. Stat. Ann., secs. 631:1, 631:2 (1991 Supp.) (amending criminal assault statutes to include physical injuries to pregnant woman resulting in miscarriage or stillbirth)

New Jersey:

Smith v. Brennan, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960) (rejecting viability requirement in cause of action for prenatal injuries) ("[m]edical authorities have long recognized that

a child is in existence from the moment of conception, and not merely a part of its mother's body"):

> We see no reason for denying recovery for a prenatal injury because it occurred before the infant was capable of independent existence. In the first place, age is not the sole measure of determining in a borderline case whether or not a fetus was viable at the time of the injury, unless it was immediately born. Therefore, the viability rule is impossible of practical application . . . In addition, . . . medical authority recognizes that an unborn child is a distinct biological entity from the time of conception, and many branches of the law afford the unborn child protection throughout the period of gestation. The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of injury, the child sustains the same harm after birth, and therefore, should be given the same opportunity for redress.

Id. at 367, 157 A.2d at 504.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A.2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed to-day that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. It might be

> remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality.

Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988) (granting to parents a common law cause of action where a physician negligently causes the pre-birth death of an infant)

State v. Gedicke, 43 N.J.L. 86, 89-90 (1881) (interpreting state abortion law) (state abortion law amended "to protect the life of the child also, and inflict the same punishment, in case of its death, as if the mother should die")

New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent powers to enforce such an amendment.

New York:

Kelly v. Gregory, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries) ("legal separability should begin where there is biological separability" and "separability begins at conception"):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are cut off earlier than

> the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal.

Id. at 544, 125 N.Y.S.2d at 697.

North Carolina:

DiDonato v. Wortman, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child) ("[t]he public policy of this state as expressed by the legislature in our statutes recognizes that an unborn child is a person") (Martin, J., concurring in part and dissenting in part)

Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), vacated and remanded (construing criminal abortion statute):

> Apart, the sperm and the unfertilized egg will die; neither has the capacity to grow and develop independently as does the fertilized egg. During fertilization, sperm and egg pool their nucleii and chromosomes. Biologically, a living organism belonging to the species homo sapiens is created out of this organization. Genetically, the adult man was from such a beginning all that he essentially has become in every cell and human attribute.

North Dakota:

N.D. Cen. Code, secs. 12.7-17.1-02 through 12.1-17.1-06 (Supp. 1991) (amending criminal code to define broad range of crimes, including homicide, that can be committed against unborn child, regardless of gestational age)

Hopkins v. McBane, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live

birth requirement in wrongful death actions) ("it is commonly understood that an unborn child is a human being or person which has life and which, even prior to the process of birth, can experience death")

statute providing that "[a] child conceived but not born is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth" was intended "to ensure and to protect the interests of a child subsequent to its conception but prior to its birth"), id. 359 N.W. 2d at 864

Ohio:

Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law) (holding that human life is entitled to federal constitutional protection from conception) ("a new life comes into being with the union of human egg and sperm cells" and "such terms as 'quick' or 'viable', which are frequently encountered in legal discussion, are scientifically imprecise and without recognized meaning")

Williams v. Marion Rapid Transmit, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949) (recognizing cause of action for prenatal injuries):

> To hold that the plaintiff in this case [a viable unborn child] did not suffer an injury in her person would require this court to announce that as a matter of law the infant is part of the mother until birth and has no existence in law until that time. In our view such a ruling would deprive the infant of the right [to a remedy] conferred by the [Ohio] Constitution upon all persons, by the application of a time worn fiction not founded on fact and within common knowledge untrue and unjustified.

The court also quoted with approval Prosser on Torts (3d ed.) wherein Professor Prosser stated, "So far as duty is concerned, if existence at the time [of injury] is necessary, medical authority has recognized long since that the child is in existence from the moment of conception, and that for many purposes its

existence is recognized by the law." Id. at 127, 39 Ohio Ops. at 439, 87 N.E.2d at 339.

Oklahoma:

Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations) (defining "unborn child" as "the unborn offspring of human beings from the moment of conception, through pregnancy, and until live birth . . . ")

Evans v. Olson, 550 P.2d 924, 925 (1976) (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions) ("there is no medical or scientific basis" for the proposition that "[a]n unborn child has no juridical existence apart from its mother")

Oregon:

State v. Ausplun, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law):

> The statute refers to "any woman pregnant with a child" without reference to the stage of pregnancy. When a virile spermatozoon unites with a fertile ovum in the uterus, conception is accomplished. Pregnancy at once ensues, and under normal circumstances continues until parturition. During all this time the woman is "pregnant with a child" within the meaning of the statute. She cannot be pregnant with anything else than a child. From the moment of conception a new life has begun, and is protected by the enactment. The product of conception during its entire course is imbued with life, and is capable of being destroyed as contemplated by the law. By such destruction the death of a child is produced and often that of its mother as well.

Mallison v. Pomeroy, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries) ("[i]n Oregon we have recognized by statute the separate entity of an

unborn child by protecting him in his property rights and against criminal conduct, and we can see no logical reason why a viable child should not be protected for injuries sustained through the tortious acts of another")

Libbee v. Permanente Clinic, 268 Or. 258, 518 P.2d 636, 520 P.2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child)

Pennsylvania:

Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.) (abortion regulations) (defining "unborn child" and "fetus" as "an individual organism of the species homo sapiens from fertilization until live birth")

Amadio v. Levin, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions) ("a child en ventre sa mere is a separate individual from the moment of conception")

Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries) (viability "has little to do with the basis right to recover, when the foetus is regarded as having existence as a separate creature form the moment of conception")

Pennsylvania Constitutional Convention Call (H.R. 71, 1978 Gen. Assembly, 1978 Pa. Laws 1431):

> [A]pplication to the Congress . . . to call a convention for drafting and proposing an amendment to the Constitution . . . to guarantee the right to life to the unborn fetus by doing the following:
>
> (a) With respect to the right to life guaranteed in the United States Constitution, provide that every human being subject o the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a

person and entitled to the right to life.

(b) Provide that Congress and the several states shall have concurrent powers to enforce such an amendment by appropriate legislation.

* * *

(d) Nothing in this article shall prohibit a law permitting only those medical procedures required to prevent the death of the mother.

Rhode Island:

R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute):

> It shall be conclusively presumed in any action concerning the construction, application or validity or sec. 11-3-1 [prohibiting abortion] that human life commences at the instant of conception and that said human life at said instant of conception is a person within the language and meaning of the fourteenth amendment of the Constitution . . .

Sylvia v. Gobeille, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries) (noting "the medical fact that a fetus becomes a living human being from the moment of conception" and rejecting viability as a "decisive criterion" because "there is no sound reason for drawing a line at the precise moment of the fetal development when the child attains the capability of an independent existence")

Presley v. Newport Hospital, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child) (citing with approval the civil law proposition that "from the moment of conception a separate organism comes into existence" and the medical proposition that "an ovum, once it is fertilized, is a separate living entity"):

> [V]iability is a concept bearing no relation to the attempts of the law to provide remedies for civil wrongs. If we profess allegiance to reason, it would be seditious to adopt so arbitrary and uncertain a concept as viability as a dividing line between those persons who shall enjoy the protection of our remedial laws and those who shall become, for most intents and purposes, nonentities. If it seems that if live birth is to be characterized, as is so frequently has been, as an arbitrary line of demarcation, then viability, when enlisted to serve that same purpose, is a veritable non sequitur.

Id. at 188, 365 A.2d at 753-54 (dicta in plurality opinion).

Rhode Island Constitutional Convention Call (Act of Apr. 21, 1977, H.R. 5150):

> Requests Congress to call a convention to propose a constitutional amendment which would provide that every human being subject to the jurisdiction of the United States or any state shall be deemed from the moment of fertilization to be a person and entitled to the right to life; provides that Congress and the states shall have concurrent power to enforce such an amendment.

South Dakota:

State v. Munson, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law) (citing with approval holding in *Steinberg v. Brown*, 321 F. Supp. 7431 (D. Ohio 1970), that human life is entitled to federal constitutional protection from conception)

S.D. Codified Laws Ann., sec. 21-5-1 (1987) (amending wrongful death statute to include "an unborn child" without regard to gestational age)

S.D. Codified Laws Ann., sec. 22-17-6 (1988) ("[a]ny person who intentionally kills a human fetus by causing an injury

to its mother is guilty of a Class 4 felony")

S.D. Codified Laws Ann., sec. 26-1-2 (1992) ("[a] child conceived, but not born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth")

Texas:

Thompson v. State, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law):

> The State of Texas is committed to preserving the lives of its citizens so that no citizen "shall be deprived of life . . . except by the due course of the law of the land." [Citation omitted]. [The Texas abortion law] is designed to protect fetal life . . . and this justifies prohibiting termination of the life of the fetus or embryo except for the purpose of saving the life of the mother.

Leal v. C.C. Pitts Sand and Gravel, Inc., 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth), rev'g 413 S.W.2d 825 (Tex. Civ. App. 1967) (denying cause of action) and app'g dissenting opinion of Justice Cadena, 413 S.W. 2d at 828 ("medical science . . . consider[s] that life begins at conception"), id. at 829 ("legalistic concept that the unborn child is but a part of its mother" is "contrary to scientific fact and comon sense")

Witty v. Am. Gen. Capital Dist., Inc., 727 S.W.2d 503, 505 (Tex. 1987) (denying cause of action for wrongful death of viable child who was stillborn but recognizing "the fetus as having an existence separate from its mother")

Yandell v. Delgago, 468 S.W.2d 475 (Tex. Civ. App. 1971) (rejecting viability requirement in cause of action for prenatal injuries), writ ref'd n.r.e. per curiam, 471 S.W.2d 569 (Tex. 1971)

Utah:

Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law):

> It is the finding and policy of the Legislature, reflecting and reasserting the provisions of Article I, Section 1 and 7, Utah Constitution, which recognize that life founded on inherent and inalienable rights is entitled to protection of law and due process; and that unborn children have inherent and inalienable rights that are entitled to protection by the state of Utah pursuant to the provisions of the Utah Constitution.

Sec. 76-7-301.1(2):

> The state of Utah has a compelling interest in the protection of the lives of its unborn children.

Sec. 76070301.1(3):

> It is the intent of the Legislature to protect and guarantee to unborn children their inherent and inalienable right to life as required by Article I, Sections 1 and 7, Utah Constitution.

Utah Code Ann., sec. 76-5-201(1) (1992 Supp.) (defining offense of criminal homicide as causing "the death of another human being, including an unborn child")

Utah Constitutional Convention Call (H.R.J. Res. 28, 42nd Legis., Reg. Sess., 1977 utah Laws 1317, 1318):

> Requests Congress to call a convention for the purpose of drafting and submitting for ratification by the states, an amendment to the Constitution that will guarantee to every human life, from the moment of fertilization throughout its natural existence, in every state, territory, and possession of the United States, the full protection of all laws respecting life,

expecting an unborn child whose mother's life would otherwise be lost.

Virginia:

Kalafult v. Gruver, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth) (noting "developments in medical science, especially in the field of embryology," court held that "an action may be maintained for recovery of damages for any injury occurring after conception, provided the tortious conduct and the proximate cause of the harm can be established")

Wisconsin:

Wis. Stat. Ann., sec, 940.04(6) (West 1982) (criminal abortion statute defining "unborn child" as "a human being from the time of conception until it is born alive")

Puhl v. Milwaukee Auto Ins. Co., 8 Wis.2d 343, 356, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries):

> The viability theory has been challenged as unrealistic in that it draws an arbitrary line between viability and non-viability and fails to recognize the biological fact that there is a living human being before viability. A child is no more a part of its mother before it becomes viable than it is after viability. It would be more accurate to say that the fetus from conception lives within its mother rather than as a part of her. The claim of a child injured before viability is just as meritorious as that of a child injured during the viable stage.

Kwaterski v. State Farm Mut. Auto Ins. Co., 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions) (assertion that "[a] child has not juridical existence apart from its mother" has "no scientific or medical basis in fact")

APPENDIX D

18th Century British Common Law Which Considered The Child as a Person Before Birth

The 18th Century British Common Law, both the courts of law and of equity, held the child *en ventre sa mere* to be a person. A review of the case law demonstrates that in 18th Century Britain: (a) the courts reasoned from the fact that such child is a person, as it is *en ventre sa mere*, to the application of law and equity to that child; (b) the Equity courts, in this instance, learnt their equity (i.e. what was natural justice) as much from principles of law as from its own rulings; (c) courts sitting in civil cases learnt from the principles of criminal law recognizing the child before birth; and (d) the live birth of the child served to provide proof of what was the case during his or gestation - i.e. that the child was a person in existence at the relevant time during gestation, the gender of the child if pertinent, and that the child was indeed alive in utero at the time when the injuries, observable at birth and of what the child then died, were inflicted by the accused charged with the child's murder.

In *Beale v. Beale*, (1713) 1 P. Wms. 244 (24 ER 373) (England), Harcourt LC reasoned from the regard for the child *en*

ventre sa mere at law (i.e. before the courts of law as distinct to equity) to what a court of equity should do:

> As to the other objection, it would be very hard in a court of equity, that a child, because it happened not to be born at such a time, must, therefore, be unprovided for, but as the law in many respects, regards an infant in *ventre sa mere*, so as to allow such child to be vouched (1 Inst. 390); also as the mother may be guilty of the murder of the child in *ventre sa mere*, if she takes poison with an intent to poison it, and the child is born alive, and afterwards dies of that poison (3 Inst. 50, 51): so there is more reason that equity should consider such child, in order to its being *provided for*; and therefore this posthumous child may be well looked upon, in equity, to be *living at her father's death* in *ventre sa mere*. (at 246, underling added)

In *Burdet v. Hopegood*, 1718 1 P. Wms. 486 (24 ER 484) (England), where a testator died leaving his wife *ensient* with a son, the plaintiff Sir Robert Burdet, it was nevertheless objected that "the testator had died leaving a son at the time of his death". The report records:

> Hereupon Lord Chancellor *Parker* referred [the question] to the judges of the King's Bench, who were unanimously of opinion, that the plaintiff Sir *Robert* though not born, had yet an existence in the eye of the law, as in *ventre sa mere*, which in many respects was regarded: as if a woman takes poison to kill her child then in her womb, and the child is born alive, and afterwards dies of that poison, the woman is guilty of murder (vide *Beale v. Beale*, ante, 244); also a child in *ventre sa mere* may be vouched, and may be a devisee, and it would be

> hard to disinherit such an only child, nor could it be imagined the testator ever intended to so to do. (underlining added)

With this the Lord Chancellor agreed, and gave judgment for the plaintiff. To meet the objection, the judges of the King's Bench reasoned from the fact that the plaintiff was in existence when a child *en ventre sa mere*, as recognised by the courts of law, of which they gave a number of instances, notably, the criminal law: they concluded that the testator's intention embraced this son in existence at his death. It was only the *proof* of this which was briefly delayed. No fiction or straining of language was involved in arriving at the result.

In *Thellusson v. Woodford* (1805) 11 Ves. Jun. 112 (32 ER 1030) (England), the House of Lords was asked on appeal to determine the following objection, as to why the testator's Will was said to infringe the rule against perpetuities:

> The second objection, which has been made in this case is, that the testator has added to the lives of persons in being at the time of his decease those of persons not then born. (at 138; 1040)

This related to twin grandsons of the testator *en ventre* at his death: they were defendants in the action (4 Ves. 237; ER 122) (England). It was to their detriment if they were held to be

persons in being at the testator's death, because if they were not they could eventually be entitled to the accumulated property, applying the doctrine of *Cy pres* (as noted in argument, 4 Ves. 298; ER 152) (England).

Lord Chief Baron Macdonald, delivering the unanimous opinion of the Judges, first held that by the words "born in due time afterwards" the testator was referring to the period of gestation, and mean, "...such children of the several persons named as their respective mothers were *ensient* with at the time of his death" (at 138-139; 1041). Then, in dismissing this as a ground of objection to the Will, he applied a number of cases recognizing the existence of the child *en ventre sa mere* (at 139; 1041): in particular, the *Beale* and *Burdet* cases noted above, and also the following cases recognising that the child *en ventre sa mere* is a person in reality, to all intents and purposes - -

> In *Wallis v. Hodgson* [sic] (2 Atk. 117) (England) Lord Hardwicke held, that a posthumous child was entitled under the Statute of Distributions; and his reason deserves notice. 'The principal reason (says he) that I go upon, is, that the Plaintiff was *en ventre sa mere* at the time of her brother's death, and consequently a person *in rerum nutura* [sic, *natura*]; so that by the rules of the Common and Civil Law she was, to all intents and purposes, a child, as much as if born in the father's lifetime," ...In *Doe v. Lancashire* (5 Term Rep. 49) (England),

> the Court of King's Bench has held, that marriage and the birth of a posthumous child revoke a Will, in like manner as if the child had been born in the life-time of the father. In *Doe v. Clarke* (2 H. Black. 399) (England) Lord Chief Justice Eyre holds, that independent of intention an infant *en ventre sa mere* by the course and order of nature is then living; and comes clearly within the description of a child living at the parent's decease; and he professes not to accede to the distinction between the cases, in which a provision has been made for children generally, and where the testator has been supposed to mark a personal affection for children, who happen to be actually born at the time of his death. The most recent case is that of *Long v. Blackall* (3 Ves. 486; 7 Term Rep. 100) (England). There the Court of King's Bench had no doubt, that a devise to a child *en ventre sa mere* in the first instance was good, and a limitation over was good also, ... (at 139-141; 1041, underlining added).

Because the child *en ventre sa mere* is a person in being, Lord Chief Baron Macdonald held that such child was a life that could postpone vesting (at 141; 1042), and that at the time of the vesting of the estate at the end of the period of accumulation, a child *en ventre sa mere* is entitled to take (142ff; 1042).

Lord Hardwicke supported his ruling in *Wallis v. Hodson* (1740) 2 Atk. 114 (26 ER 472) (England), noted above, by listing principles of the Common Law showing regard for children *en ventre sa mere* as persons in divers instances:

> First, as to the common law, there is the trite case of an infant *en ventre sa mere* being vouched in a

> common recovery; a mother also may justify the detaining of charters on behalf of it; a devise to him is good, by the opinion of *Treby* and *Powell*, in *Scatterwood* and *Edge*, 1 *Salk*. 229, a bill may be brought in his behalf, and this court will grant an injunction in his favor to stay waste, 2 *Vern*. 710, *Musgrave versus Parry*, et al. (at 117; 473)

At first instance in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227 (31 ER 117) (England), it is similarly objected: "That a devise for the life of a child *en ventre sa mere* is void" (at 320; 162). In answer to this, Buller J applied the same passage from Lord *Hardwicke* in *Wallis v. Hodson* on which the House of Lords also relied, and then continued:

> In the same case [*Wallis v. Hodson*] Lord *Hardwicke* takes notice, that the Civil Law confines the rule to cases, where it is for the benefit of the child to be considered as born: <u>but notwithstanding he states the rule to be, that such is to be considered living to all intents and purposes</u>.
>
> ...
>
> ... In *Doe v. Clarke*, the words 'that wherever such consideration would be for his benefit, a child *en ventre* sa mere shall be considered as absolutely born' were used by me, because I found them in the Book, from whence the passage was taken. But there is no reason for so confining the rule. <u>Why should not children *en ventre sa mere* be considered generally as in existence? They are entitled to all the privileges of other persons</u>. In this case it is enough to say, such a child is capable of having an estate given to him, and consequently to another person for his life. The infant is not hurt, nor is the

> Law transgressed, by giving the interest to a third person any more than by giving it to the infant himself.
>
> ...
>
> *Goodtitle v. Wood* (7 Term Rep. B.R. 103, note) (England) is an authority to the same point. The effect is, that there is no difference between a child actually born and a child *en ventre sa mere*. In *Lancashire v. Lancashire* Judge Grose says, 'I know of no argument founded on law and natural justice, in favor of the child, who is born during his father's life, that does not equally extend to a posthumous child, ... " (at 322-324; 163-164, underling added)

Her Majesty's Attorney-General, a respondent, was of like mind: he submitted to the House of Lords, "The whole foundation for the argument, that such children are to be considered as in being for their own benefit only, rests upon some words which some Reporters of Decisions have ascribed to Judges, when delivering their opinions upon claims made by such children. But these words, if they were used in those cases, by no means negative the proposition, that such children are in being for all purposes. There is no reason for confining the rule. They are entitled to the privileges of all persons; and it is reasonable, that they should be the means of conferring privileges upon other persons. But the law considers such children as being in cases, in which they may be prejudiced. They may be vouched in a

recovery (Co. Lit. 390a); though such voucher is for the purpose of making them answerable over in value. They may be executors." (11 Ves. Jun. 112, 129-130; 1037).

In the result, determining the case "according to the rules of Law and Equity", Lord Eldon (HL) affirmed the judgment at first instance. (150-151; 1045).

That Chancery and the King's Bench were *ad idem* that an infant *en ventre sa mere* was a life in being, as apparent from the references in the case to the history of *Long v. Blackall* before those two Courts. (4 Ves. 227, 341-343; 11 Ves. 112, 150) That the Court of Common Pleas was of the same mind, appears from the ruling of Eyre LCJ in *Doe v. Clarke* (1795) 2 H.Bl. 399 (126 ER 617) (England) noted by the House of Lords (see quotation above).

The reasoning in the several quotations set out above grounded the property rights of a child *en ventre sa mere* in his reality as a person in being. Even more so should the child's existence justify his or her life being protected by others, before and after birth, giving rise to a defence in a criminal case. In fact, as *Beale v. Beale* (1713) and *Burdet v. Hopegood* (1718) show, it was apparent to the court from the criminal law that the child *en* ventre sa mere is a living person. It is equally apparent, too, from

the fact that such child has a right not to be injured, for there is a duty of care to him or her: *Watt v. Rams* [1972] VR 353 (England); *Lynch v. Lynch* [1991] Aust Tors Reports ¶81-117 (SCt), affirmed (1991) 25 NSWLR 411 (CA) (England). Intentionally injury would be a trespass. [If the child cannot sue until birth, that appears to be a procedural bar: *Watt*, 376 lines 1-6; *Lynch* (SCt), page 69,096 (2nd para.)]

The rule in *Burdet v. Hopegood* and other cases said Loughborough LC in *Thellusson v. Woodford* (1798) 4 Ves. Jun. 227-342 (England), "is according to every principle of justice and natural feeling." These same principles equally justify the application of the justification of defence of others in respect to infants *en ventre sa mere*.

Two later House of Lords cases do not affect the result in *Thellusson* or its reasoning from the substantive fact that the child *ensient* is a person in being, nor the substantive principles of law or equity relating to the child *en ventre sa mere* cited in that case:

(1) *Villar v. Gilbey* [1907] AC 139 (HL) (England) re-asserted as a rule of construction that the word "born" is construed to include an unborn child only where that construction is necessary for its benefit. Counsel for the appellant expressly

noted, "It is necessary to distinguish between cases of construction proper and cases in which a principle of law is involved." (at 139-140) Lord Loreburn LC noted (at 144) some of the principles of substantive law relating to the child *en ventre sa mere*, such as the law's solicitude for the child and that it can be a party to proceedings (which Lord Hardwicke noted in *Wallis v. Hodson*), before he turned to the matter of construction in that case. At 149, Lord Atkinson briefly distinguished *Thellusson* as relating to the rule against perpetuities, but did not disturb its substantive reasoning or the result.

(2) *Elliot v. Lord Joicy* [1935] AC 209 HL (England) also involved a question of construction relating to a posthumous child (he was held not to come within the intention of the testatrix as appearing from her Will). *Thellusson* was again distinguished as relating to perpetuity only and having "nothing to do with any question of construction analogous to the question now in issue" (at 220 middle); a dictum of Lord Eldon relating to construction was qualified in its effect so that the rule of construction for the benefit of posthumous child did not apply where the benefit were only of an indirect kind (at 228-229, read with 220-221). Lord MacMillan, after noting that English and Scots law on the question

of interpretation where a posthumous child is concerned was the same (at 236-237), accepted the following learned statement of Scots law as accurate:

> the doctrine of the Civil Law which has long been received into our system of jurisprudence, that a child born after the period at which the vesting of a right falls to be determined, but proved by the period to its birth to have been in utero at that time, is entitled to the rights of an existing period from the period of its conception. ... (239, underlining added)

In other words birth serves, not to change the child's status from non-entity to person, but as *proof* of the child's existence in utero, with the entitlement to "the rights of an existing person from the period of its conception." CF. In re *Wilmer's Trusts* [1903] 1 Ch. 874, 880-883; [1903] 2 Ch. 411 (CA), 417-421, (England) where what became known at birth was "related back" as proof of that being the fact also during gestation: the child *ensient* at the testatrix's death turned out to be a son when born - "here we must treat it as the actual fact that there was a third son in existence prior to the death of the testatrix" (at 421, CA). He was thus a relevant life for the rule against perpetuities - in *Thellusson* the gender of the twins *ensient* at the testator's death was immaterial.

In *Thellusson*, the court reasoned from the fact that the child *ensient* is a person in existence to establish that the principles of law relating to perpetuities were not offended by holding such child to be a life in being at the testator's death. Because *Thellusson* involved a principle of law, it went further than the rule of construction involved in the *Villar* and *Elliot* cases: its recognition of the child during gestation was "to all intents and purposes", in fact it was to the prejudice of the twins in that case. [Likewise, *In re Wilmer's Trusts* [1903] 2 Ch. 411 (CA) (England), 421, per Romer LJ] That there are other principles of law which also apply to a child *ensient* for his or her benefit or prejudice, indeed, rights or liabilities, was noted in the quotations from *Thellusson* and the earlier cases given above.

In a recent Scotish case, *McWilliams v. Lord Fraser of Carmyllie* (28 July 1992) (England), Lord Morton of Shuna refused to apply *Elliot v. Lord Joicey* to a negligence claim where the parents were suing for damages for the death of their child who was injured in utero then born alive and died.

The defender had conceded that during the period Martin was alive there was, assuming fault, a liability to pay damages to Martin for his pre-natal injuries, but this concession was limited to

the child's right of action being dependent on the legal fiction that, "in all matters affecting its interests, the unborn child in utero should be deemed to be already born", described by Lord MacMillan in *Elliot v Joicey* (at 238). The defender limited his concession to that fiction because, in applying this rule of construction in that case, Lord MacMillan said that "According to the law of Scotland, a child in utero is fictionally deemed to be already born only when the result of applying the fiction is to benefit the child when actually born, and that the fiction cannot be invoked in the interests of any third party." The defender argued that, for this reason, the parents as third parties had no claim. (pp. 3-4)

Lord Morton rejected this reliance on *Elliot* because he accepted the view of the Scottish Law Commission that there was a duty of care to a child in the womb (p.6), and that a child born alive with injuries could recover under the principles of negligence (pp.6-10): he held that this is "the law of Scotland both before and after the passage of the Damages (Scotland) Act" (p.10). Returning to the legal fiction referred to by Lord McMillan in *Elliot v. Joicey*, he considered some case law and concluded:

For these reasons I consider that it is not necessary

> to rely on the 'legal fiction' to give a child who is born alive a title to sue for injuries sustained in utero and that if a child dies after being born alive and the death is cause by injuries sustained in utero the parents of that child have a title to sue for damages for the death of that child. I shall accordingly repel the defender's plea to the relevancy [of the claim]. - (p.13)

Lord Morton was right in principle to refuse to allow the rule of construction in *Elliot* to excuse a defendant where liability turned, not on any legal fiction, but on substantive issues such as the duty of care towards another.

APPENDIX E.

QUOTATIONS CONCERNING THE CLASS OF HUMAN BEINGS WHO POSSESS NATURAL AND INALIENABLE RIGHTS TO LIFE

1. In a speech reflecting upon the Fred Scott decision in Springfield, Illinois on June 26, 1857, Abraham Lincoln, in criticizing Chief Justice Roger Taney's acknowledgement that the Declaration of Independence was broad enough to include "the whole human family," but failed to implement the principles therein encompassed, explained the principle J.M. exposes:

   "They (the founding fathers) meant simply to declare the right (to life, liberty and happiness) so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard for free society, which should be familiar to all, and revered by all, constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and the happiness and value of life to all people of all colors everywhere. The assertion that 'all mean are created equal...' was placed in the Declaration, not for [separation from Britain], but for future use." Lincoln on Democracy, "A Standard Maximum for Free Society," (June 16, 1857), p. 90, 91

2. Compare what Lincoln says here about slavery to the "present controversy":

   "All these free blacks are the descendants of slaves, or have been slaves themselves, and they would be slaves now, but for something which has operated on their white owners, inducing them, at vast pecuniary sacrifices, to liberate them. What is this something? Is there any mistaking it? In all these cases it is your sense of justice, and human sympathy, continually telling you, that the poor

negro has some natural right to himself -- that those who deny it, and make mere merchandise of him, deserve kicking, contempt and death." Abraham Lincoln, Peoria Speech, 1854.

3. At Galesburg, the other day, I said, in answer to Judge Douglas, that three years ago there never had been a man, so far as I knew or believed, in the whole world, who had said that the Declaration of Independence did not include negroes in the term 'all men'. I reassert it today. I assert that Judge Douglas and all his friends may search the whole records of the country, and it will be a great matter of astonishment to men if they shall be able to find that one human being three years ago had every uttered the astounding sentiment that the term 'all men' in the Declaration did not include the negro. Do not let me be misunderstood. I know that more than three years ago there were men who, finding this assertion constantly in the way of their schemes to bring about the ascendancy and perpetuation of slavery, denied the truth of it. I know that Mr. Calhoun and all the politicians of his school denied the truth of the Declaration. I know that it ran along in the mouth of some Southern men for a period years, ending at last in that shameful, though rather forcible, declaration of Petit of Indiana, upon the floor of the United States Senate, that the Declaration of Independence was in that respect a 'self-evident lie', rather than a self-evident truth. But I say... that three years ago there never had lived a man who had ventured to assail it in the sneaking way of pretending to believe it, and then asserting it did not include the negro..." Lincoln, Lincoln's speech at Alton, during the Lincoln-Douglas debates.

4. Chief Justice Taney and Judge Stephen Douglas assert that the authors of the Declaration of Independence did not intend to include negroes. In this assertion, they do 'obvious violence to the plain, unmistakable language of the Declaration. I think the authors of that notable instrument intended too include all mean, but they did not intend to declare all men equal in all respects. They did not mean to say all were equal in color, size intellect, moral

developments, or social capacity. They defined with tolerable distinctness, in what respects they did consider all men created equal -- equal in 'certain inalienable rights, among which are life, liberty, and the pursuit of happiness.' This they said, and this they meant....They meant to set upa standard maxim for a free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.' Lincoln, Speech of the Dread Scott decision, 1857.

5. 'Let us discard all this quibbling about this man the other man, this race and that race and the other race being inferior, and therefore must be placed in an inferior position. Let us discard all these things, until we shall once more stand up declaring that all men are created equal.' Lincoln, Chicago Speech, July 10, 1858.

6. "I trust I understand, and truly estimate the right of self-government. My faith in the proposition that each man should do precisely as he pleases with all which is exclusively his own, lies at the foundation of the sense of justice there is in me .... The doctrine of self-government is right -- absolutely and eternally right -- but it has no just application, as here attempted. Or perhaps I should rather say that whether it has such just application depends upon whether a negro is <u>not</u> or <u>is</u> a man. If he is <u>not</u> a man, why in that case, he who <u>is</u> a man may, as a matter of self-government, do just as he pleases with him. But if the negro <u>is</u> a man, is it not to that extend, a total destruction of self-government, to say that he too shall not govern <u>himself</u>? When the white man governs himself that is self-government; but when he governs himself, and also governs <u>another</u> man, that is <u>more</u> than self-government -- that is despotism. If the negro <u>is</u> a man, why then my ancient faith teaches me that 'all men are created equal'; and that there can be no moral right in connection with one man's making a slave of another." Lincoln, Speech on the Kansas-Nebraska Act, 1854.

7. 'It was impossible to raise the question of the status of the humanity of the Negro, without at the same time raising an equally vital question concerning the status of the humanity of white men. It was impossible to deny the Negro the natural rights demanded for all men by the Declaration of Independence without denying the natural foundation of the rights of white men. And it was impossible to change radically the way of conceiving of the white man's rights without changing radically the white man's life. Even if the legal foundation of American rights had remained the same -- which Lincoln believed impossible -- the changed conception of their extra-legal foundation in 'the laws of Nature and of Nature's God' would have been catastrophic to him. It would have been a change in the inner consciousness of the American citizen which would have sapped his moral dignity and have deprived him of his inner worth ...'

Harry V. Jaffa, Crisis of the House Divided: An Interpretation of the Issues in the Lincoln-Douglas Debates (Chicago: The University of Chicago Press, 1959), 303.

APPENDIX F.

List of Quotations from Founders of the United States and Framers of the Constitution which Evidence the Principle that the Right to Life As a Natural and Inalienable Right Is Beyond the Power of Government to Withhold from any Class of Human Beings.

1. James Wilson

In this constitution (1789) all authority is derived from the people ... when a single government is instituted, the individuals of which it is composed surrender to it a part of their natural independence, which they before enjoyed as men. The Works of James Wilson, ed by James DeWitt Andrews, Callaghan & Co., Chicago (1896) Vol. I & II, James Wilson, Speech in Convention, November 16, 1987 p. 539, 545.

2. John Adams

Rights antecedent to all earthly government - Rights that cannot be repealed or restrained by human laws - Rights derived from the great Legislator of the universe. ... British liberties are not the grants of princes or parliaments, but original rights, conditions of original contracts ... coeval with government. ... Many of our rights are inherent and essential, agreed on as maxims, and established as preliminaries, even before a parliament existed. 3 Adams, Life and Works 448-64, at 449, 463.

3. John Adams

Whether we should recur to the law of nature, as well as to the British constitution, and our American charters and grants. Mr. Galloway and Mr. Duane were for excluding the law of nature. I was strenuous for retaining and insisting on it, as a recourse to which we might be driven by Parliament much sooner than we were aware. Adams,

Life and Works 374.

4. Alexander Hamilton

The sacred rights of mankind are not to be rummaged for, among old parchments, or musty records. They are written, as with a sun beam in the whole volume of human nature, by the hand of the divinity itself, and can never be erased or obscured by mortal power. Alexander Hamilton, "The Farmer Refuted." This can be found in Morton J. Frisch, ed., Selected Writings and Speeches of Alexander Hamilton (Washington: American Enterprise Institute for Public Policy Research, 1985), 21.

5. Alexander Hamilton

The law of nature [is] '... coeval with mankind, and dictated by God himself, [and] is, of course, superior in obligation to any other. It is binding over all the globe, in all countries, at all times. No human laws are of any validity, if contrary to this ...' Alexander Hamilton, ibid., 20. (quoting Blackstone's Commentaries)

6. Alexander Hamilton

In short, when human laws contradict or discountenance the means, which are necessary to preserve the essential rights of any society, they defeat the proper end of all laws, and so become null and void. Alexander Hamilton, ibid., 22.

7. John Dickinson

...[A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed, of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this -- that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. Fabius (John Dickinson of Pennsylvania), Letter IV.

8. Tench Coxe

This is a most enlightened time, but more especially so in regard to matters of government. The divine right of kings, the force of ecclesiastical obligations in civil affairs, and many other gross errors, under which our forefathers have lain in darker ages of the world, are now done away. The natural, indefeasible and unalienable rights of mankind form the more eligible ground on which we now stand ... On this solid basis is reared the fabric of our new federal government. These taken together form THE GREAT AND WHOLE OF THE AMERICAN CONSTITUTIONS, the fairest fabric of liberty that every blessed mankind, immovably founded on a solid rock, whose mighty base is laid at the center o the earth." Essay by a democratic Federalist (likely Tench Coxe), printed in the Philadelphia Independent Gazetteer, 26 November 1787.

9. James Madison

Let us recur 'to the great principle of self-preservation; to the transcendent law of nature and of nature's God, which declares that the safety and happiness of society are the objects at which all political institutions aim and to which all such institutions must be sacrificed.' James Madison, Federalist No. 43.

10. James Madison

Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe ... If 'all men are by nature equally free and independent,' all men are to be considered as entering into Society on equal conditions; as relinquishing no more, and therefore retaining no less, one than another, of their natural rights ... Either then, we must say, that the will of the legislature is the only measure of their [the people's] authority; and that in the plentitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave ... [natural] right untouched and sacred ..." James Madison, "memorial and

Remonstrance," 1785. This can be located in Marvin Meyers, ed., The Mind of the Founder: Sources of the Political Thought of James Madison (Hanover: University press of New England, 973), 6-13.

11. Thomas Jefferson

'And can the liberties of a nation be thought secure when we have removed their only firm basis, a conviction in the minds of the people that these liberties are the gift of God? That they are not to be violated but with his wrath? Indeed I tremble for my country when I reflect that God is just; that His justice cannot sleep forever ...' Thomas Jefferson, Notes on Virginia, Query XVIII. In this passage Jefferson is speaking about the God-given, natural and inalienable rights of all human beings and referring specifically to the fact that one of these rights -- the right to liberty -- has been denied to some human beings, i.e., to "slaves."

Numerous commentaries express this view of the constitution framers' understanding of natural and inalienable rights.

1. The Declaration of Independence appeals to the "laws of nature and of nature's God "to justify the United States' break with Britain and to declare to a candid world the basis of the political order that will take its place. The purpose and limits of political life are determined by the rule of a higher law in the divine and natural order. It could be said that God and nature, in the founders' understanding, are man's supreme legislature. This natural standard of right, which transcends all human laws and constitutions, directs politics in two ways. First, it shows politics its proper end, namely the safety and happiness of the people. ... Law is called a rule, in order to distinguish it from a sudden, a transient, or a particular order: uniformity, permanency, stability, characterize a law. In this way James Wilson, who along with Hamilton and Madison was the most thoughtful of the Constitution's framers, distinguished a law from an ad hoc decision made regarding a particular case. ... The rule of law, in sum, is a

governmental practice designed to make as likely as possible the coincidence of the two requirements of just government: that it be by the consent of the people and that it secure the safety and happiness of society.

Saving the Revolution: The Federalist Papers and the American Family, Ed. by Charles R. Kesler, The Free Press, N.Y. (1987)

2. Yet the human nature that modern constitutions channel cannot be considered mere matter. Human beings are not a formless sea of humanity; they are not body but bodies, and each body has a form and an end that, though common to other bodies, distinguish it from other bodies: the self and its preservation. men are not unformed; the form is given by nature - in the state of nature, according to Locke. This form is arranged and managed in the constitution of civil society, but is not itself changed by the constitution maker. ... Civil constitutions exist to serve and protect the form and end that men have in the state of nature, the rights of *man*, not of citizens. America's Constitutiona Soul, Harvey C. Mansfield, J.r, John Hopkins Univ. Press, Brittain (1991).

3. (a) There are, it is predicated, certain principles of right and justice which are entitled to prevail of their own intrinsic excellence, altogether regardless of the attitude of those who wield the physical resources of the community. Such principles were made by no human hands; indeed, if they did not antedate deity itself, they still so express its nature as to bind and control it. They are external to all Will as such and interpenetrate all Reason as such. They are eternal and immutable. In relation to such principles, human laws are, when entitled to obedience save as to matters indifferent, merely a record or transcript, and their enactment an act not of will or power but one of discovery and declaration. ...

(b) Thus the legality of the Constitution, its supremacy, and its claim to be worshipped, alike find common standing

ground on the belief in a law superior to the will of human governors. ...

(c) That is to say the essential ingredient of the justice which is enforced by the state is not of the state's own contrivance; it is a discovery from nature and a transcript of its constancy. ...

(d) And the less casual evidence of everyday speech is to like effect: "the people of these United Colonies," "your whole people," "the people of America," "the liberties of American," "the rights of Americans," "American rights," "Americans." The constant recurrence of such phrases in contemporary documents bespeaks the conscious identity of Americans everywhere in possession of the rights of men. Natural rights were already on the way to become national rights. The Higher Law Background of American Constitutional Law, edward S. Corwin, Cornell Univ. Press, Ithica (1984), p. 4, 5 8, 80.